ADMINISTRATIVE PROCEDURE

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 10194, H.R. 10195, H.R. 10196, H.R. 10197, H.R. 10198, and H.R 10199

ADMINISTRATIVE PROCEDURE

DECEMBER 4, 1975

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ADMINISTRATIVE PROCEDURE

THURSDAY, DECEMBER 4, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2141, Rayburn House Office Building, Hon. Walter Flowers [chairman of the subcommittee] presiding.

Present: Representatives Flowers and Kindness.

Also present: William P. Shattuck and Jay T. Turnipseed, counsels; David Minge, consultant; and Alan F. Coffey, Jr., associate counsel.

Mr. FLOWERS. We will have to begin promptly. The schedule has been changed on the House floor, and the House went into session at 10 this morning. We are going into continued session and after that, the tax bill. Our hearing this morning may be limited to an hour, or slightly less. I have a few remarks which I would like to make by way of an opening statement. Then, we will see if we can't establish some ground rules for the hearing this morning in order to expedite the process.

The hearing this morning is on a series of bills which I introduced on October 9, 1975, which are intended to improve administrative procedures. The basis for administrative justice in our country is the Administrative Procedure Act adopted in 1946. Since that date, the act has not been materially changed other than by addition of what is properly known as the Freedom of Information Act. However, the Administrative Procedure Act has deficiencies. As early as 1953, the President's Conference on Administrative Procedures was formed to recommend improvements. The Conference's report in 1955 together with that of the Hoover Commission and its task force on legal services convinced the American Bar Association that it should join in these efforts. In the 22 years since that time a number of basic reforms have been generally recognized as desirable. However, differences of approach and lack of joint congressional action have frustrated the enactment of the legislation.

Finally, in 1972 the American Bar Association adopted a resolution endorsing 12 proposals for a change. All of these proposals have been reviewed by the Administrative Conference of the United States and other interested parties. Finally, we are at the point now where firm positions have crystalized and the matter is fit for quick and long-awaited congressional action.

H.R. 10194 through H.R. 10199 are designed to implement these and other reforms and the administrative process.

We have with us this morning a distinguished group of witnesses: Mr. Warfield Ross, an attorney for the Administrative Law Section of the American Bar Association; Francis M. Gregory, also an attorney for the Administrative Law Section of the American Bar Association; Mr. Richard Berg, executive secretary of the Administrative Conference of the United States; and William Fauver, president of the Federal Administrative Law Judges Conference. Judge Fauver has been a friend of mine since we both matriculated at the University of Alabama Law School just about the year before last, wasn't it?

Judge FAUVER. Just about that time.

Mr. FLOWERS. It is excellent to have all of you here, particularly my old classmate William. Gentlemen, I have distributed copies of the ABA statement as well as the administrative conference statement. Judge, if you have a statement, we will, of course, receive the full statement for the record. But because of the limitations of time and in order to get into the real nuts and bolts of those proposals as quickly as possible, I would suggest that each of you make what comments you would like to make and that we then regard this as a roundtable discussion. We will just go down the line and discuss the matter point by point. Does that suit everyone? Would my colleague Mr. Kindness from Ohio like to make an opening statement?

Mr. KINDNESS. Thank you, Mr. Chairman. I don't have any opening statement to make by way of introduction, other than to express the concern that the changes that are proposed here are certainly, in part, controversial. I'm sure they would have an effect upon the operations of most of the administrative agencies, and a comment from that quarter might certainly be in order. But the attempt to better safeguard the rights of individuals and corporations, having their interests affected by administrative actions, and by administrative rulemaking, is a concern in which I certainly share.

It is, however, a concurrent concern that there not be made of the administrative process something too closely akin to the judicial process so that adjudicatory cases, at any rate, that one might as well be in court. These quasi-judicial administrative agencies were established for the purpose of making expert determinations on an administrative level, without having to resort to the courts at the initial stage of decisionmaking. But if, in the administrative process, we too closely parallel the procedures that are inherent in the judicial process, then we will have created something that might be a little bit too complex and make too much work for lawyers. Being a lawyer myself, I can appreciate that; but being also a taxpaying citizen, I must express the concern that maybe we have a little bit too much complication arising out of the proposals that are before us.

So I will be very interested to hear the statements of the witnesses, directed at those particular concerns.

Mr. FLOWERS. Thank you very much, Tom. Without objection the bills H.R. 10194 through 10199 will be placed in the record at this point.

94TH CONGRESS
1ST SESSION

H. R. 10194

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) section 551 (4) of title 5, United States Code, is amended to read as follows:

"(4) 'rule' means the whole or a part of an agency statement of general applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of an agency;".

(b) Section 551 (14) is added to read as follows:

"(14) 'ratemaking and cognate proceedings' means agency process for the approval or prescription for the future of rates, wages, corporate or financial structure of reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.".

(c) Section 556(d) is amended to insert before the words "rule making" in the last sentence thereof the words "artemaking and cognate proceedings,".

(d) Section 557(b) is amended to insert before the words "rule making" in the fourth sentence thereof the words "ratemaking and cognate proceedings,".

SEC. 2. Section 553 of title 5, United States Code, is amended as follows:

(1) Paragraph (1) of subsection (a) is amended to read as follows:

"(1) a matter pertaining to a military or foreign affairs function of the United States that is (A) specifically authorized under criteria established by Executive order to be kept secret in the interest of the national defense or foreign policy and (B) is in fact properly classified pursuant to such Executive order; or".

(2) Paragraph (2) of subsection (a) is amended by inserting a period after "personnel" to read as follows:

"(2) a matter relating to agency management or personnel.".

(3) Clause (B) of the third sentence of subsection (b) is amended to read as follows:

"(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including the interest of national defense or foreign policy in a matter pertaining to a military or foreign affairs function). The agency shall publish in the document promulgating each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.".

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94TH CONGRESS
1ST SESSION

H. R. 10195

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 554(d) of title 5, United States Code, is amended to read as follows:

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency, in which case such decision shall be made by an employee qualified to preside at hearings pursuant to section 556 of this title. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public facilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency.".

SEC. 2. Section 556 of title 5, United States Code, is amended by adding a new subsection (g) to read as follows:

"(g) (1) Except to the extent required for the disposition of ex parte matters as authorized by law, the employee who presides at the reception of evidence may not—

"(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

"(ii) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

"(2) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that case or a factually related case, participate or advise in the decision, or agency review pursuant to section 557 of this title, or in a review by an appeals board pursuant to section 557 (c) of this title, except

on the record as witness or counsel in public proceedings unless timely and adequate notice and reasonable opportunity to respond is given to all parties.

"(3) This subsection does not apply to the agency or any member of the body comprising the agency.".

94TH CONGRESS
1ST SESSION

H. R. 10196

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 554(d) of title 5, United States Code, is amended to read as follows:

"(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency, in which case such decision shall be made by an employee qualified to preside at hearings pursuant to section 556 of this title. This subsection does not apply—

"(A) in determining applications for initial licenses;

"(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

"(C) to the agency or a member or members of the body comprising the agency.".

SEC. 2. Section 556 of title 5, United States Code, is amended by adding a new subsection (g) to read as follows:

"(g) (1) Except to the extent required for the disposition of ex parte matters as authorized by law, the employee who presides at the reception of evidence may not—

"(i) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

"(ii) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

"(2) An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except

as witness or counsel in public proceedings or as authorized by section 557 (b) (1), except that in ratemaking and cognate proceedings and in cases not subject to section 554 (d) of this title, an employee shall not be deemed to have engaged in the performance of investigative or prosecuting functions solely by virtue of his general organizational or supervisory responsibility for such functions.".

94TH CONGRESS
1ST SESSION

H. R. 10197

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 5 of title 5, United States Code, to provide for improved administrative procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 557 (b) of title 5, United States Code, is amended to read as follows:

"(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee

makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency or appeal to an agency appeal board established pursuant to section 557 (d) of this title within the time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision, except as it may limit the issues on notice or by rule. An agency may provide by rule that decisions, or categories of decisions incuding agency appeal board decisions, become final, unless reviewed by the agency at its discretion. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in ratemaking and cognate proceedings, rulemaking, or determining applications for initial licenses, the procedure required by this subsection may be omitted for a particular proceeding or a specified category of proceedings for which an agency finds, on the record, that an expedited decision is imperatively and unavoidably required to prevent public injury or defeat of legislative policies.".

SEC. 2. (a) Section 575 of title 5, United States Code, is

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amended by adding at the end thereof a new subsection (d) as follows:

"(d) The Conference is authorized to establish a Committee on Uniform Rules composed of (1) the Chairman of the Conference, who shall serve during his term of office as chairman of the committee, (2) two members of the Council designated from time to time by the Chairman, and (3) eight other members of the Conference who shall be appointed by the Chairman with the approval of the Council. Five members of the committee (excluding the chairman for this purpose) shall be employees of Federal regulatory agencies or executive departments; and five shall not be so employed. A vice chairman shall be designated by the committee from among its members. The committee is authorized to draft and submit to the Conference uniform procedural rules to be utilized by all agencies in conducting proceedings subject to section 554 of this title, and amend or revise such rules from time to time. Notice to the public and participation by the public, orally, or in writing, in drafting such rules shall be provided. If not disapproved by a majority vote of the members of the Conference in attendance at the next succeeding plenary session, such rules or amendments shall be binding on all agencies in proceedings subject to section 554 of this title. The chairman, with the approval of a

majority of the committee, is empowered to grant waivers or modifications of particular rules on petition of affected agencies, and agencies may adopt other procedural rules not inconsistent with any effective uniform rule.".

(b) Section 576 of title 5, United States Code, is amended by redesignating the first sentence as subsection (a) and adding at the end thereof a new subsection (b) as follows:

"(b) There are authorized to be appropriated $50,000 for the fiscal year ending June 30, 1976, $100,000 for the fiscal year ending June 30, 1977, and $100,000 for the fiscal year ending June 30, 1978, to carry out the purposes of section 575(d) of this title.".

SEC. 3. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof a new subsection (c) as follows:

"(c) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(1) No interested person shall make or cause to be made to any member of the body comprising the agency, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, an ex parte communication relevant to the merits of the proceeding.

"(2) No member of the body comprising the agency, hearing examiner, or employee who is or may be involved in the decisional process of said proceeding, shall make or cause to be made to an interested person an ex parte communication relevant to the merits of the proceeding.

"(3) A member of the body comprising the agency, hearing examiner, or employee who is or may be involved in the decisional process or said proceeding, who receives a communication in violation of this subsection, shall place on the public record of the proceeding:

"(A) written information submitted in violation of this subsection;

"(B) memorandums stating the substance of all oral communications submitted in violation of this subsection;

"(C) responses submitted to the materials described in subparagraphs (A) and (B) of this subsection.

"(4) Upon receipt of a communication in violation of this subsection from a party or which was cause to be made by a party, the agency, hearing examiner, or employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to

show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation.

"(5) The prohibitions of this subsection shall apply at such time as the agency may designate, but in no case shall they apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case said prohibitions shall apply at the time of his acquisition of such knowledge.".

(b) Section 551 of title 5, United States Code, is amended by adding a new paragraph (14) to read as follows:

"(14) 'ex parte communication' means an oral or written communication not on the record with respect to which reasonable prior notice to all parties is not given.".

(c) Section 556(d) of title 5, United States Code, is amended by inserting after the third sentence thereof the following: "The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(c) of this title sufficient grounds for a decision adverse to a party who has committed such violation or caused such violation to occur."

SEC. 4. Section 554 of title 5, United States Code, is amended by adding at the end thereof a new subsection (f) as follows:

"(f) The agency may provide by rule for abridged hearing procedures for use in such proceedings as the agency may designate by rule or order. Such abridged procedures shall be on the record, shall be reasonably calculated to promptly, adequately, and fairly inform the agency and the parties as to the issues, facts, and arguments involved, and shall be for use only by the unanimous consent of the parties. Wherever possible, hearing examiners shall be designated to conduct such abridged proceedings unless the agency itself makes the decision. The availability of an abridged hearing procedure shall not preclude the agency, in any other proceeding or class of proceedings to the extent authorized by section 556 (d) of this title, from requiring the submission of all or part of the evidence in written form without the consent of all parties where the interest of any party will not be prejudiced thereby.".

SEC. 5. (a) Subchapter II of chapter 5 of title 5, United States Code, is amended by adding at the end thereof a new section as follows:

"§ 560. Prejudicial publicity

"(a) Except as provided by subsection (b), no agency, or any member, employee, or agent thereof, shall make any

ably be expected to alleviate the harm to which the adversely affected person has been exposed.

"(c) Any person aggrieved by a violation of this section may obtain judicial relief, either in a proceeding relevant to the subject matter in a court specified by statute, or in an action for declaratory judgment or writ of prohibitory or mandatory injunction in a court of competent jurisdiction. The reviewing court may set aside any agency action taken in an agency proceeding or enter such other order as it deems appropriate, if it finds that this section has been violated.".

(b) The analysis of chapter 5 of subtitle is amended by adding after item "559" the following:

"560. Prejudicial publicity.".

written or oral public statement or release, or make public any document, concerning or relating to an agency investigation or proceeding if the contents of the statement, release, or document (i) evidence prejudicial bias or prejudgment concerning facts in issue in the investigation or proceeding, or (ii) may otherwise harm any person in his business, property, or reputation, unless the benefit to the public clearly exceeds the potential harm to the person adversely affected: *Provided, however,* That nothing herein shall be construed to prevent or prohibit the disclosure of any document which is part of the public record in an agency proceeding or any other document available to the public pursuant to section 552 of this title.

"(b) When any agency, or any member, employee, or agent thereof, makes any such statement or release, or makes public any such document, which may reasonably be expected to cause harm of the type described in susbection (a) (ii), the agency shall (1) notify the adversely affected person and, if it is a written statement, release, or document, supply him with a copy thereof, at least seventy-two hours prior to making such statement, release, or document public except in emergency circumstances or where impracticable, and (2) make public by the same means as the statement, release, or document is made public any further agency action or determination the publication of which may reason-

94TH CONGRESS
1ST SESSION

H. R. 10198

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 557 of title 5, United States Code, is amended by adding at the end thereof a new subsection (d) as follows:

"(d) Each agency may establish, by rule, one or more agency appeal boards for review of decisions of presiding employees. Such appeal boards shall be composed of agency members, hearing examiners (other than the presiding employee in the proceeding on appeal), or other appropriate

agency employees. Such other agency employees shall be in a grade classification or salary level commensurate with their review duties, in no event less than the grade classification or salary level of the employee or employees whose actions are to be reviewed, and they shall not be removable from appeals boards except in the manner provided for hearing examiners. In the performance of their review functions such employees shall not be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. Each agency shall specify in such rules the circumstances and conditions under which the agency will (1) entertain and consider appeals to it directly from the decision of a presiding employee, and (2) entertain and consider appeals only after decision of an agency appeal board. An agency may provide by rule that decisions or categories of decisions, including agency appeal board decisions, become final unless reviewed by the agency in its discretion.".

SEC. 2. (a) Section 555(d) of title 5, United States Code, is amended as follows:

"(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency

shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpenas. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.".

(b) (1) Section 556 of title 5, United States Code, is amended by deleting the words "authorized by law" in subparagraph (c) (2) of such section, redesignating subsections (d) and (e) as (e) and (f), respectively, and by inserting after subsection (c) the following new subsection (d):

"(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpena any person to appear and testify or to appear and produce books, papers, documents, or tangible things, or both, at a hearing or deposition at any designated place. Subpenas shall be issued and enforced in accordance with the procedures set forth in section 555 (d) of this title. In case of failure or refusal of any person to obey a subpena, the agency may invoke the aid of the district court of the United States for any district in which such person is found or resides or

transacts business in requiring the attendance and testimony of such person and the production by him of books, papers, documents, or tangible things. Unless otherwise authorized by law, the Attorney General shall represent the agency in appeals from district court decisions granting or denying enforcement of subpenas. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpenas and for the judicial enforcement thereof.".

(2) The heading of such section 556 is amended to read as follows:

"§ 556. Hearings; presiding employees; powers and duties; subpena power; burden of proof; evidence; record as basis of decision".

94TH CONGRESS
1ST SESSION

H. R. 10199

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 9, 1975

Mr. FLOWERS introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 7, title 5, United States Code, with respect to procedure for judicial review of certain administrative agency action, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 702 and 703 of title 5, United States Code, are amended to read as follows:

"§ 702. Right of review

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating

a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute granting consent to suit for money damages forbids the relief which is sought.

"§ 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by

law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.".

SEC. 2. (a) Section 1331, title 28, United States Code, is amended to read as follows:

"§ 1331. Federal questions

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.".

(b) The item relating to section 1331, title 28, United States Code, contained in the section analysis of chapter 85, title 28, United States Code, is amended to read as follows:

"1331. Federal questions.".

SEC. 3. The first paragraph of section 1391 (e) of title 28, United States Code, is amended to read as follows:

"(e) A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority, or an agency of the United States, or the United States may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, or (2) the cause of action arose, or (3) any real property involved in the action is situated, or (4) the plaintiff resides if no real property is involved in the action. Additional persons may be joined as parties to any such action in accordance with the Federal Rules of Civil Procedure without regard to other venue requirements.".

Mr. FLOWERS. Our first witness is Mr. William Ross.

TESTIMONY OF WILLIAM WARFIELD ROSS, ATTORNEY, ADMINISTRATIVE LAW SECTION OF THE AMERICAN BAR ASSOCIATION; ACCOMPANIED BY FRANCIS M. GREGORY, ATTORNEY, ADMINISTRATIVE LAW SECTION OF THE AMERICAN BAR ASSOCIATION

Mr. Ross. Thank you, Mr. Chairman. I am William Ross. I will be speaking on bills H.R. 10194 through H.R. 10198. My colleague will be speaking on H.R. 10199, which is commonly known as the sovereign immunity bill. The preceding bills, that is 10194 through H.R. 10198, stem from studies made by the American Bar Association of the Administrative Procedure Act commencing in 1956. There were extensive hearings before a subcommittee of the Senate Judiciary Committee in the mid-1960's on proposals of this kind which led to the enactment of a bill in the Senate revising the Administrative Procedure Act. No action was taken on that bill in the House unfortunately. Since that time and particularly since 1963, the ABA has had constant study of revisions of the act. We believe on the 30th anniversary of the enactment of the act, serious congressional attention is fully warranted.

Our revisions are intended as essentially nonpartisan. They are not designed to overjudicialize the adjudicatory processes of the Federal administrative agencies. Whereas in the past, certain ABA proposals would have been subject to that criticism, we submit that these are not. They are nonpartisan balancing agency needs, with those of the public and individuals. They specifically take account of the problems of delay and overcomplexity in our opinion.

Our focus is to improve agency adjudications, which is where we are encountering our main problems in agency process today. Our purpose is to improve agency performance on the merits: That is, to produce better quality decisions. Our purpose is to make the agency process faster by dealing with specific procedure problems which present occasions of delay and to make the agency process fairer for the individual. We believe that our proposals are timely in the sense that there is public focus today on government and on the impact of government on citizens.

The ABA's prepared statement on these bills I understand will be incorporated into the record. I am going to only give four very brief illustrations of our proposals and why we think they are important and should receive attention by this Congress and should be enacted. First, the proposals providing for subpena powers for Federal agencies. I practice, among other things that I do, before the Food and Drug Administration. The Food and Drug Administration is concerned with safeguarding our citizens from illness and injury as a result of dangers in foods, drugs, cosmetics, and devices. The Food and Drug Administration must make literally thousands of factual determinations every year as to whether or not foods or drugs or so forth are safe and effective. The Food and Drug Administration has no subpena powers. I can tell you as a practitioner before that agency that it is a great disadvantage. There are other Federal agencies today that make many adjudications that have no power to compel the production of testimony or documents. This is not merely a present problem. If it were, the Congress could enact specific legislation granting

subpena power to these agencies. Our proposal would remedy that. It would provide for a general subpena power in the Federal agency where the agency has the responsibility to resolve issues of fact.

We also think that agency heads need employee appeals boards. They need at least the authority to establish such boards, which is really all that our proposal does. It does not force them to do so. It merely makes clear what is now quite doubtful as a matter of law that they have the authority to delegate their responsibility to decide routine, minor and possibly trivial adjudicatory matters in the review stage, to delegate them to employee boards which are responsible to them. Now this process has worked well before the Federal Communications Commission, the ICC, and the NRC. We believe that it is extremely helpful in enabling the agency heads to focus on the important matters to decide issues and policies. Today the agency head is confronted with literally hundreds or thousands of adjudications which they must decide, Mr. Chairman, since virtually every adjudication is appealed. We think, therefore, that this proposal is essentially noncontroversial and should be enacted.

I have only two more examples. It is an astonishing thing that at this stage of the development of administrative practice, secret and illicit communications to the heads of Federal administrative agencies do not violate any Federal statute. It is true that they may violate the Federal Constitution because they may result in a denial of due process as the Federal courts have held, but we think it is long overdue that there be a Federal law which tells both the head of the agency and the person outside the agency that he should not make this kind of secret communication on the merits of an adjudicatory on-the-record proceeding.

The provision which we recommend has already been enacted by the Senate as a part of the sunshine legislation. Again we think it is inherently noncontroversial.

Finally, and this is my last example and I deliberately restrict myself to just these four examples because of the shortage of time and I would refer the committee most earnestly to our statement in support of the other legislative proposals. Finally, we believe that Government procurement regulations, for example, should be adopted through open process, through open proceedings. Our proposal, which has the support of the Administrative Conference, would provide ordinary notice and comment rulemaking, which is not at all burdensome, and provide that such rulemaking should be followed in the adoption of, for example, Government procurement regulations. Government procurement as you know in certain sectors of our economy is the single, most important economic impact. We think that these regulations, which need not be secret should certainly be adopted after receipt of comments from the public.

These are simply four examples of what we believe to be long overdue revisions of the Administrative Procedure Act and we would most respectfully request that this subcommittee report out legislation which would propose enactment of our revisions.

Thank you very much.

Mr. FLOWERS. Thank you.

Mr. Gregory, would you like to make a comment at this time?

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Mr. GREGORY. Thank you very much, Mr. Chairman. I appreciate the opportunity to be here. I am vice chairman of the committee on judicial review of the administrative law section. I am here together with my colleague Bill Ross because one bill namely, H.R. 10199, more directly affects matters of interest to our committee, namely, judicial review. I have a prepared statement summarizing the bill and our comments on it which you stated would be introduced in the record.

Mr. FLOWERS. Fine.

[The statements referred to follow:]

STATEMENT OF WILLIAM WARFIELD ROSS, CHAIRMAN, COMMITTEE ON REVISION OF THE ADMINISTRATIVE PROCEDURE ACT, SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

This testimony is addressed to four bills: H.R. 10194, H.R. 10195, H.R. 10197, and H.R. 10198. These bills represent the American Bar Association's proposals to revise the Administrative Procedure Act. They contain ten amendments that would make the administrative process both faster and fairer. Now, that government regulation is increasingly under attack, this kind of reform is highly desirable. The American Bar Association urges the passage of these bills.

This statement will discuss the ten proposals one-by-one. It should be noted at the outset that H.R. 10194 and H.R. 10198 have been endorsed by both the ABA and the Administrative Conference (except for slight modifications in H.R. 10198 that will be explained below). This statement begins with six proposals that are solely the ABA's (H.R. 10195 and H.R. 10197) and concludes with four that both organizations have endorsed (H.R. 10194 and H.R. 10198).

The remaining bills under consideration are H.R. 10196, an Administrative Conference alternate for H.R. 10195, and H.R. 10199, a proposal on a different subject—judicial review of administrative actions. The ABA's position on H.R. 10199 will be presented by Mr. Francis Gregory in a separate statement.

SEPARATION OF FUNCTIONS (H.R. 10195)

It is basic to our concept of fairness that the same person should not be both prosecutor and judge. The present Administrative Procedure Act embodies this principle by requiring agencies to separate functions: employees who investigate or prosecute cases cannot participate in deciding them. This requirement, however, does not extend, under the present Act to many kinds of proceedings. The ABA proposal would assure a complete separation of functions within agencies, thereby ensuring that prosecutorial bias will not infect agency decisions.

The present Act prohibits an agency employee engaged in the performance of "investigative or prosecuting functions" in a case from participating or advising in the decision of that case, *except in ratemaking, rulemaking and initial licensing proceedings.* H.R. 10195 would remove that exception. The result would be that in *all* agency proceedings which are required by law to be decided on the record after opportunity for hearing, agency employees engaged in investigative or prosecuting functions could not participate in or advise in the decision of the proceeding on an *ex parte* basis. Any participation by such an employee would require notice to the parties and an opportunity for them to respond except where the employee is employed as witness or counsel in public proceedings. The proposal would ensure that the presiding employee at such proceedings would not be responsible to any employee who is investigating or prosecuting for the agency. The provision would ensure, for example, that a senior staff member with a prosecutorial interest in a case would not be the supervisor of the employee assigned to decide the case. As under existing law, none of these prohibitions would apply to agency or Commission members.

The Report of the Attorney General's Committee on Administrative Procedure which led to the adoption of the Administrative Procedure Act recognized that separation of functions is vital.[1]

"[T]he advocate—the agency's attorney who upheld a definite position adverse to the private parties at the hearing—cannot be permitted to participate after the hearing in the making of the decision. A man who has buried himself in one

[1] S. Doc. No. 8, 77th Cong., 1st Sess. (1941), p. 56.

side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions. Clearly the advocate's view ought to be presented publicly and not privately to those who decide.

"These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable. But they are also avoidable and should be avoided by appropriate internal division of labor."

In the present Act, ratemaking and initial licensing were exempted from the separation of functions requirement, largely by historical accident (because ratemaking was originally performed by the legislature) and by a misplaced emphasis upon their policy making aspects. Experience since the enactment of the APA in 1946 has demonstrated that such distinctions are artificial and without sound rational basis. Initial licensing and ratemaking, like other adjudicatory and quasi-adjudicatory proceedings, frequently involve the resolution of conflicting principles and claims and contested factual issues, of vital importance to members of the public. Despite the fact that they can also involve—like any important adjudications—significant policy matters, "basic fairness requires that such a proceeding be carried on in the open." [2]

Professor Kenneth Culp Davis, a leading authority on administrative law, contends that a proceeding involving fixing rates for the future "has a quality resembling that of a judicial proceeding," and cites the Supreme Court's holding in the *Second Morgan* case [3] that it is not only an irregularity in practice, but a vital defect, when the decisional officer "accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them." [4] The ABA proposal would close the loophole that presently exempts many important agency decisions from this fundamental requirement.

H.R. 10195 also has a provision making it clear that if an Administrative Law Judge (ALJ) becomes unavailable to the agency before making his decision, the decision shall be made by another ALJ.

2. ASSURING DECISIONS BY ADMINISTRATIVE LAW JUDGES (H.R. 10197, SEC. 1)

The usual procedure in agency adjudications is to hold a hearing before an ALJ who renders an initial decision, subject to appeal within the agency. This procedure assures a full, fair hearing and an impartial decision based solely on the evidence adduced at the hearing. The present Act, however, permits agencies holding evidentiary hearings in ratemaking, rulemaking and initial licensing cases to omit the ALJ decision in favor of a tentative decision by the staff or the agency itself. The ABA proposal would delete this exception except where a real need for urgent action requires otherwise.

At present, Section 554(d) and Section 57(b) of the Act require that the presiding officer issue an initial decision in all cases in which there is a hearing on the record, *except* in certain ratemaking, rulemaking and initial licensing proceedings. The purpose of this requirement, "to assure an objective appraisal of the facts and the furtherance of the public duty imposed upon the agency," was recognized in the Report of the Attorney General's Committee on Administrative Procedure leading to the adoption of the Administrative Procedure Act: [5]

"To accomplish this it is necessary that the evidence be heard and the facts be reported to the agency head by an official who shall command public, confidence both by his capacity to grasp the matter at issue and by his impartiality in dealing with it. The heads of the agency cannot, through press of duties, sit to hear all the cases which must be decided. Their function is to supervise and direct and to hear protests of alleged error. *If the initial decision*—which may dispose of the case or be the statement of it from which the appeal may be taken to the heads—*can carry a hallmark of fairness and capacity, a great part of the criticism of administrative agencies will have been met.*" [Emphasis added]

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[2] *Sangamon Valley Television Corp.* v. *United States,* 106 U.S. App. D.C. 30, 33, 269 F.2d 221, 224 (1959).
[3] *United States* v. *Morgan,* 304 U.S. 1, 22 (1937).
[4] Davis, Administrative Law § 3.00 (1970 Supp.), p. 454.
[5] S. Doc. No. 8, 77th Cong., 1st Sess. (1941), pp. 43–44.

The importance and independence of the hearing officer were characterized as "the heart of formal administrative adjudication."[6] The requirement of ALJ decisions embodies the maxim of hornbook law that "he who hears should decide."

In ratemaking cases before some agencies, in particular the Interstate Commerce Commission (ICC) and Federal Communications Commission (FCC), a general practice has evolved of bypassing the initial decision of the presiding officer in favor of a recommended decision by a staff official. This practice has had several very unsatisfactory results:

a. Delay.—Where the presiding ALJ is to issue the initial decision, he is able to follow the evidence closely, is fully familiar with the complete record, and is able to embark promptly upon the writing of his decision. Where the recommended decision is prepared by a staff official who must make himself familiar with the record after the hearing is closed, sometimes completely unjustifiable delays of as much as three years have resulted.

b. Analysis of the issues and evidence in the decision.—A presiding ALJ's initial decision generally follows the traditional practice of exposition and evaluation of the evidence developed on the record in the light of the issues, while a staff official not involved in the day-to-day hearing is more likely to ignore substantial blocks of evidence in the record due to his greater interest in policy formulation.

c. Unfairness.—A hearing looks fairer and probably is fairer when the initial decision is issued by an impartial and independent presiding officer rather than by a staff official. This is especially true when the alternative is a staff official who has been involved in the investigation or prosecution of the case.

d. Diminished Role of ALJ.—When the presiding officer is not charged with writing the initial decision, his responsibility for developing the record is diminished and the importance of his role as the presiding judicial officer in the hearing is demeaned. Too often under those circumstances he feels constrained to sit merely as a proctor deferring to the views of the trial staff of what is material (particularly if the staff is to write the recommended decision), and as a result the evidence may be inadequately developed.

It is noteworthy that the FCC has recently decided to alter its procedures, so that the ALJ will "generally" (but apparently not in all cases) prepare an initial decision in ratemaking cases.[7] The FCC thereby proposes to adopt the recommendations of its Task Force on Adjudicatory Reregulation, which has stated, based on the previous experience of the agency in pursuing the alternate course of a recommended decision by a staff official:

"The current failure to use the presiding officer to prepare an intermediate decision for consideration by the Commission would seem necessarily to prolong the time for preparation of the decision. Bureau staff who have not participated in the hearing must become familiar with a voluminous record. This in itself is a duplication of effort that is unsupportable if expedition is of primary concern to the Commission. The Administrative Law Judge is already familiar with the case from his role as presiding officer. Decision writing is one of the regular duties of his position. By examination he has been found qualified to prepare decisions. He is accustomed to making impartial judgments on the evidence, finding facts, and drawing conclusions. These are sound arguments for the Commission to require the preparation of the intermediate decision by the Administrative Law Judge.

"Lack of experience in the subject matter is no deterrent. Experience can be acquired and *ad hoc* assistance can be provided in disciplines such as accounting and statistics on an *ad hoc* basis if necessary.

"The reasons for a general rule requiring the presiding judge to prepare the intermediate decision have been persuasively argued for many years. The Task Force does not see any viable counter-argument to that made in 1965:[8]

> "The issuance of an intermediate decision by the examiner who presided at the hearing utilizes the familiarity with the case acquired by his exposure to the raw data during the hearing. The meaningful participation of the parties is enhanced by their opportunity, prior to a final decision by the

[6] *Id.* at p. 46.
[7] *Amendments of Parts 0 and 1 of the Commission's Rules With Respect to Adjudicatory Re-regulation Proposals,* Docket No. 20626, FCC 75–1250 (Nov. 14, 1975).
[8] Cramton, *Administrative Procedure Reform: The Effects of S. 1663 on the Conduct of Federal Rate Proceedings,* 16 Adm. L. Rev. 108, 139 (1964).

agency, to respond to a tentative formulation of agency policy applied to the facts of the particular case. Experience indicates that the issuance of a comprehensive and well-reasoned intermediate decision by the presiding examiner frequently results in the elimination of some of the controverted issues, while the remaining issues, as a result of the intermediate decision and the exceptions to it, are reduced to more manageable proportions by the time the case reaches the agency for final decision.

"This reliance on the presiding officer to write the decision means that the Commission is fully using judges' abilities for the benefit of the Commission. The fact that most ratemaking proceedings concern far-reaching and important matters of policy that could seriously affect the economy and the industry should not preclude preparation of a decision by an Administrative Law Judge. The Task Force recommends that the rule prescribe that he is to prepare only a recommended decision. Thus, no decision of a judge could become final for lack of review and the Commission would continue to exercise its policy making functions."

One of the principal arguments which have been advanced in favor of a recommended decision by the staff official or a tentative decision by the agency itself has been that the parties are thereby apprised in advance of "the agency's thinking before it hardens into a final decision." [9] This view, however, turns principles of fairness upside down. As Circuit Judge Friendly has noted, "for commissioners, as for judges, freedom of decision is at least subconsciously constricted once a position has been publicly taken." [10] The time for views to be presented, so that they may be tested in the crucible of the hearing, is during the hearing itself, when the parties have the opportunity to present evidence bearing on those views, not after the record has been closed. If the trial staff is not able to articulate during the hearing the views which may be anticipated, and which should be fairly subsumed in the designated issues, then the trial staff has been deficient in the performance of its functions in the course of the hearing. Moreover, the value of having an impartial ALJ decision far outweighs the benefit to the parties of having a sneak preview of the agency's thought processes.

The claim has also been made that the agency or its staff should issue the intermediate decision in ratemaking cases because the issues are too complex and difficult for the ALJ. This is an unwarranted aspersion upon the competency of the members of the ALJ corps, who as much as Federal judges, are often called upon to render decisions in cases involving huge records, a maze of evidence, and extremely technical jargon and concepts. If the issues and evidence adduced are difficult and complex, the burden is upon the counsel participating in the hearing to make them understandable so that the presiding officer may render an informed decision. In addition, unless the agency is to delegate its decision-making function to its staff, if the issues and evidence are unintelligible to the ALJ, it is likely that they will be equally unintelligible to the nonspecialist members of the agency who are charged with the responsibility of deciding the case.

The proposal would also make it clear that an ALJ decision is final unless appealed to or reviewed on motion of the agency or commission. The proposal does not, however, impinge in any way on the authority of the agency or commission to make decisions in all cases it wants to decide.

Finally, the ABA proposal deals with the problems presented by the unusually urgent case. In some instances, we recognize, it is necessary to omit the ALJ decision in favor of immediate action by the agency or commission. However, the language in the present Act authorizing such a procedure (5 U.S.C. 552(b)(2)) is being used by some agencies—*e.g.* the Interstate Commerce Commission—to routinely omit ALJ decisions in large numbers of cases.[11] The ABA proposal therefore substitutes more precise language, requiring that "for a particular proceeding or a specified category of proceedings," the agency find on the record that "an expedited decision is imperatively and unavoidably required to prevent public injury or defeat of legislative purposes." This amendment would ensure that the original purpose of the provision is adhered to: that ALJ decisions be omitted only where there is a genuine need for urgency.

[9] Goodman, "An Analysis of ABA Recommendation 8," Administrative Conference of the United States study.

[10] *Davis and Randall, Inc. v. United States*, 219 F. Supp. 673, 679 (W.D.N.Y. 1963).

[11] A study of the Administrative Conference of the United States, fn. 5 supra, indicates that generally there is no substantial savings of time in the ICC practice.

3. UNIFORM RULES OF PROCEDURE (H.R. 10197, SEC. 2)

This amendment deals with the rules of procedure in normal adjudications: the rules that govern such matters as the taking of evidence, when motions may be made, time limits, and so on. At present each Federal agency sets its own procedures, producing a multiplicity of rules. The amendment would lead to the adoption of a uniform set of rules.

The present procedural rules followed by Federal administrative agencies are a veritable jungle of requirements, with numerous traps for the unwary. Countless pages in the Federal Register and the Code of Federal Regulations are consumed in detailing adjudication procedures for each of the many agencies of the Federal Government. This complex diversity is one of the reasons why many practitioners specialize in practicing before one agency. It is also a factor which contributes to localizing the practice of administrative law in the District of Columbia.

As long as each Federal administrative agency has its own unique rules, the person who has practiced before that agency will have a distinct advantage over the person who is unfamiliar with its rules. In most cases the person unfamiliar with the agency and its rules is your constituent who lives outside the Washington, D.C. area and has little if any prior contact with a particular agency. Maintenance of the present system will continue this disadvantage.

The existing diversity is not the product of or required by differences in agency function. Rather it is caused largely by historical accident and the inevitable tendency of each agency to look on its procedural problems as unique, whereas they are common to all agencies engaged in formal adjudication.

Many distinguished persons and organizations have advocated the adoption and use of uniform procedural rules in formal adjudication. The precursor to the present Administrative Conference recommended uniform rules in a 1955 report to President Eisenhower.[12] The late Chief Justice Earl Warren, in supporting a permanent Administrative Conference, stated that one of its missions would be "to develop uniform rules of practice and procedure."[13] When President Kennedy established the second temporary Administrative Conference in 1961, he said that an important purpose would be to "bring a sense of unity of our administrative agencies and a desirable degree of uniformity to their procedures."[14] The House of Delegates of the American Bar Association adopted a resolution in August, 1970, calling for the adoption, "in formal adjudication, to the extent practicable, [of] uniform rules governing pleadings, discovery, the admission of evidence, requirements of proof, decisions, and appeals."

Section 2 of H.R. 10197 empowers the Administrative Conference to establish a Committee on Uniform Rules to direct the drafting and promulgation of uniform rules. The Committee is to be comprised of ten conference members and the chairman. Five of the members are to be from Federal regulatory agencies or executive departments and five are to be from outside the Federal government.

This Committee is authorized to draft and to amend or revise uniform rules for use by Federal regulatory agencies in formal adjudication. The drafting would be done by the Committee, its staff, and leading authorities in the academic community.

The public is to be notified and given an opportunity to participate, either orally or in writing, in the drafting process. The Committee will submit its draft rules to the Conference as a whole. If not disapproved by the Conference, the rules will become binding upon all Federal regulatory agencies undertaking formal adjudication.

There may arise an instance where a Federal agency may need to use a procedure which does not conform with a uniform rule. In such a case, the agency may petition the Committee on Uniform Rules to grant it a waiver or modification of the rule. Further flexibility is granted to agencies in that they may adopt additional rules, to the extent they do not conflict with the uniform rules.

Finally, besides setting up the mechanism for drafting and implementing uniform rules, Section 2 authorizes the expenditure of $250,000 on this project over a three-year period. The money is to be used primarily to provide a working

[12] Report of the Conference on Administrative Procedures called by the President on April 29, 1953, Recommendation E5, p. 14.
[13] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary on S. 1664, 88th Cong., 1st Sess., (1963) at p. 10.
[14] Hearings, *supra*, at p. 12.

staff for the Committee on Uniform Rules because the budget of the Administrative Conference may not presently permit the undertaking of such a project.

This proposal will improve Federal administrative procedures by:

(a) Clarifying and simplifying the procedures followed by Federal regulatory agencies. By providing more simple and direct procedures, the rules will be an aid to speeding up the administrative process.

(b) Aiding the process of deregulation by weeding out those rules which are redundant and ineffective. The present diversity of procedural rules has produced a plethora of needless government regulations. Once a uniform rule is adopted, all other rules on the same subject will be superseded.

(c) Making it easier for the public to work with Federal regulatory agencies because it will no longer be necessary to learn a different set of procedural rules for each agency.

(d) Ensuring that agencies' rules are of high quality and contain the safeguards necessary to due process. The quality and completeness of rules vary from agency to agency, and uniformity should not only simplify, but enhance the quality of formal agency adjudication.

4. EX PARTE COMMUNICATIONS (H.R. 10197, SEC. 3)

The traditional requirement of a hearing and decision on the record is to ensure both fairness and soundness; such hearings give all parties an opportunity to participate and to rebut others' presentations. Such proceedings cannot be fair or soundly decided, however, when persons outside the agency are allowed to communicate with the decision-maker in private and others are denied the opportunity to respond.

The present Act places some limits on such *ex parte* communications, but it leaves large gaps. For example, *ex parte* contacts with agency heads are not covered, and neither are contacts relating to formal, on-the-record rulemaking hearings. The ABA proposal would close all the loopholes, prohibiting all external *ex parte* communications between agency members (and decisional employees) and persons outside the agency regarding the merits of any formal proceeding. The proposal also provides that any prohibited communication received by an agency must be placed on the public record and that the agency may rule against the person who made the communication as a sanction for doing so.

A similar provision, which is acceptable to the ABA, has passed the Senate as Section 5 of S. 5, the Government in the Sunshine Act.

5. PREJUDICIAL PUBLICITY (H.R. 10197, SEC. 5)

As the Federal agencies in increasing numbers and to an increasing degree enter into the daily life of the public through their regulation of business, consumer protection, wages, prices and trade practices and so on, steps should be taken to prevent agencies from abusing their power to release information to the press as a means of obtaining compliance or engaging in trial by publicity. The ABA proposal would set such limits, while recognizing that in some cases urgency or other circumstances may make immediate release of information appropriate.

When Federal agencies release inaccurate information about a company or a product, they can do devastating harm. A classic example was the highly publicized warning issued by the Secretary of Health, Education, and Welfare in November, 1959, against buying cranberries. Although the contamination problem that prompted this warning only applied to berries from two states, the Secretary suggested that all cranberries might be dangerous; the result was that virtually the entire crop went unsold. More recently, in 1970, the Federal Trade Commission (FTC) issued a proposed complaint alleging that Zerex antifreeze was ineffective and dangerous. The FTC's charges received widespread publicity. Subsequent FTC investigations concluded, however, that the product currently being sold was effective and that the manufacturer had long since withdrawn from the market the possibly dangerous formulation. This development was not publicized, and the manufacturer was seriously injured.[15]

The ABA proposal would forbid agencies and their employees from making information concerning an agency investigation public if the contents evidenced

[15] "Adverse Publicity by Administrative Agencies," report by Prof. Ernest Gelhorn to Administrative Conference, April 15, 1973.

prejudgment concerning facts at issue or would otherwise harm any person, unless the benefit to the public clearly exceeded the potential harm to the person.

The bill would also require agencies to give advance notice to the person affected by proposed publicity, so that he would have sufficient time to seek appropriate judicial review of the matter or prepare an answer which he could release to the press. This requirement would not apply in emergency situations or where otherwise impracticable. The bill would further require agencies to make public any subsequent agency action which might alleviate the harm to the person affected.

Finally, the bill would authorize any aggrieved party to obtain injunctive relief and would authorize courts to consider violation of these provisions as sufficient ground for setting aside the agency actions.

This bill's restriction on release of information does not apply to documents in the public record or otherwise subject to the Freedom of Information Act.

6. ABRIDGED HEARING PROCEDURES (H.R. 10197, SEC. 4)

A common complaint about the administrative process is that it is too slow. One solution is to use abridged procedures where no fundamental rights are denied thereby. Parties to administrative proceedings are frequently willing to agree on abridged hearing procedures that will speed decisions and reduce the drain on agency personnel and private and public resources. The ABA proposal would authorize agencies to use such abridged procedures when all the parties so agree.

While some agencies already use such abridged procedures, their legality has at times been challenged. This provision would make it clear that they are always lawful when based on consent. In addition, this provision should encourage practitioners to agree to abridged procedures, and thereby substantially increase the use of such procedures.

7. REDEFINITION OF "RULEMAKING" (H.R. 10194, SEC. 1)

The distinction between "rulemaking" and "adjudication" plays a central role in the Act and in the work of Federal agencies. The Act presently rests this distinction on whether the agency's action is of present or past effect—which it terms adjudication—or of future effect—which it terms rulemaking. This definition does not accord with generally accepted concepts as to the nature of adjudication, and has lead to anomalous results. The ABA proposal would change the definitions, so that actions of particular applicability would be "adjudication", and those of general applicability would be "rulemaking". That definition does accord with generally accepted concepts.

Under the present Act, the provisions governing rulemaking proceedings apply not only to general policy matters but also to cases involving individuals. As a result, difficulties have arisen because an appropriate procedure for making policy decisions is not necessarily the best way to decide cases involving the rights and obligations of particular persons. Policymaking requires input from many sources. Proceedings involving the rights and obligations of particular persons, on the other hand, require focus on the facts relevant to that particular case. Thus, it is desirable to limit notice and comment procedures to matters of general applicability and future effect and to treat matters of particular applicability as adjudication.

The effect of this amendment will be to change some proceedings from rulemaking to adjudication. These proceedings will then become subject to the separation of functions requirement discussed at page 2 of this statement—a requirement that helps assure fairness.

Under this amendment, ratemaking involving a single entity would be included in adjudication. However, inasmuch as such ratemaking often involves general policy issues, the proposal preserves the right of agencies to retain two procedures they currently use in such cases: they may receive evidence in writing unless a party is prejudiced thereby (under 5 U.S.C. 556(d)) and they may omit an initial ALJ decision where expedition so requires (under Section 1 of H.R. 10197).

8. PUBLIC PARTICIPATION IN RULEMAKING (H.R. 10194, SEC. 2)

Under the present Act, there are several exceptions to the requirement that an agency must give notice and allow the public to comment before it issues a rule.

The ABA-Administrative Conference proposal would narrow those exceptions, thereby assuring the public an opportunity to be heard on rules which are frequently of great public importance.

One of the current exceptions permits agencies to omit notice and comment on rules relating to "public property, loans, grants, benefits, or contracts." The ABA proposal would eliminate this so-called "proprietary exemption."

Under the present exemption, the Defense Department promulgates bidding procedures for billions of dollars of contracts without providing contractors or anyone else an opportunity to comment. The result is that rules are sometimes adopted which are either unfair or unworkable or both because they do not take account of relevant matters not known to the issuing agency. There is nothing inherently secret about these procedures and there is therefore, every reason to subject them to public comment just like other agency rules.

In addition, the ABA proposal would limit the present exemption covering foreign affairs and military policy. The purpose of this exception is to protect classified information, but it is worded much more generally.

The ABA proposal would narrow the exception to properly classified matters and parallels recent changes in the Freedom of Information Act exemption for classified information.

It should be understood that this proposal, giving the public an opportunity to comment on proposed rules, *does not limit agency discretion* in adopting any rule. It only assures the public an opportunity to comment before the agency makes its decision.

9. CREATION OF APPEALS BOARDS (H.R. 10198, SEC. 1)

A major source of delay in the administrative process is at the top level. More and more cases of increasing complexity have to funnel through a single commission or individual for a final decision, making backlogs inevitable. The ABA proposes that agencies be authorized to set up internal appeals boards to hear routine adjudications. By reducing backlogs at the top, such boards should significantly speed up both the administrative and appeal process.

At present, a typical adjudication is heard by an ALJ, who renders an initial decision. Practically all such decisions go to a commission or administrator for a final decision. The result is a backlog of cases which are routine but nonetheless must be finally decided by the agency itself. In addition to causing delay, this process tends to prevent agency members from giving necessary attention to complex individual cases and to prevent them from giving sufficient attention to major policy questions. To deal with this problem some agency members assign their personal staffs the task of screening and effectively deciding many routine cases: an off-the-record process inconsistent with the quasi-judicial model contemplated by the Act.

The ABA proposal offers agencies a better solution to this problem by authorizing them to create internal appeals boards. These boards would consist of agency members, ALJ's, or other appropriate agency employees. They would hear appeals from initial decisions in categories of cases specified by agency rule. The proposal also authorizes a procedure comparable to the *certiorari* system of the Supreme Court, in that certain categories of decisions can be made final unless the agency chooses on its own motion to review them. Thus, an appeals board would not normally be an intermediate review stage, but a final review within the agency. The proposal authorizes agencies to adopt such a procedure for ALJ decisions as well as appeals board decisions. Of course, nothing in this proposal would restrict a party's right to seek judicial review of an administrative action.

The appeals board would typically provide a final review of ALJ decision in routine adjudications which do not involve major policy questions. They would thereby speed final decisions while ensuring that they conform with agency policy, and the boards would replace the present anonymous staff review with one that is on-the-record.

H.R. 10198 as introduced in the House departs from the ABA proposal in two respects. First, it requires that the "other employees" on appeals boards have salaries or grades at least equal to that of ALJ's and be protected from removal. The ABA objects to the provision restricting removal (p. 2, lines 5–7 of H.R. 10198) because the purpose of appeals boards is to reflect agency policy and the members of such boards should be alter egos of the agency itself, subject to its immediate direction and control.

Second, H.R. 10198 requires that appeals board members not be responsible to employees with investigative or prosecuting functions. The ABA agrees with the purpose of this addition, but suggests that the provision logically belongs with the identically worded provision covering ALJ's which appears in H.R. 10195 (p. 2, lines 9–18). We suggest that the latter provision be extended to cover appeals board members and that the point be dropped from H.R. 10198.

SUBPOENA POWER (H.R. 10198, SEC. 2)

To do their job, Federal agencies resolving fact disputes must be able to gather evidence, and the power to issue subpoenas is essential to that process. Yet several important agencies, including the Food and Drug Administration, the Postal Service, and the Department of the Interior, do not have such power. The ABA proposal would give all Federal agencies that conduct formal, on-the-record proceedings, such power.

Most administrative agencies do have subpoena power, granted them in the statutes which created them. However, several such statutes omit this power. The consequence is a severe strain upon those agencies' ability to carry out their responsibilities. For example, the FDA lacks subpoena power to compel production of safety data in its on-the-record proceedings (*e.g.* to set tolerances for potentially dangerous substances in foods). Thus, the FDA's efforts to ensure the safety of foods and drugs can be slowed for months or years by the need to independently resolve matters on which data already exist. The FDA's effort to protect the public health is significantly hobbled by its lack of subpoena power.

The ABA proposal would solve such problems by adding to the Act a general grant of subpoena power for all agency proceedings, both rulemaking and adjudication, which are required to be conducted on the record with opportunity for a hearing. The proposal only applies to such formal proceedings; it is not a general grant of investigatory power. A provision in the present Act would ensure that when agencies have subpoena power, private parties to such hearings also have the right to compel production of evidence.

H.R. 10198 modifies the original ABA proposal by permitting agencies to go directly to court to enforce their subpoenas instead of going through the Attorney General. The ABA takes no position on this point.

STATEMENT OF FRANCIS M. GREGORY, JR., VICE CHAIRMAN, COMMITTEE ON JUDICIAL REVIEW SECTION OF ADMINISTRATIVE LAW, AMERICAN BAR ASSOCIATION

I am Francis M. Gregory, Jr., partner in the Washington, D.C. office of Sutherland, Asbill & Brennan. I appear today as Vice Chairman of the Committee on Judicial Review of the Administrative Law Section of the American Bar Association to testify in support of H.R. 10199. I appreciate the opportunity to be here.

H.R. 10199 is one of a series of six bills introduced by Subcommittee Chairman Walter Flowers on November 18, 1975, designed to improve federal administrative procedures and to which my colleague, William Warfield Ross, Chairman of the Committee on Revision of the Administrative Procedure Act of the Administrative Law Section will address himself. My testimony is limited to H.R. 10199 because of its peculiar effect on judicial review.

H.R. 10199 contains a series of legislative amendments that have been endorsed both by the American Bar Association and by the Administrative Conference of the United States. For the record, I would like to explain the effect of the provisions of H.R. 10199. The bill would first amend Section 702 of Title 5 of the United States Code. That section currently provides that a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereunder. H.R. 10199 would not alter this provision; it would add to it. In effect the bill would provide for abolishment of the defense of sovereign immunity in equitable actions against the United States. More specifically, it would add to section 702 a provision that an action in a court of the United States seeking relief *other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. It would also provide that the United States may be named as a de-

fendant in any such action, and a judgment or decree may be entered against the United States.

In considering these recommended additions, it is important to note that the amended section 702 would specifically provide that it would not affect other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other approriate legal or equitable ground. Further, section 702 clearly would specify that it does not confer authority to grant relief if any other statute granting consent to suit for money damages forbids the relief which is sought.

H.R. 10199 also would amend section 703 of Title 5 of the United States Code to remove the current uncertainty as to who may be named as a defendant when the United States is sued. Specifically, the sentence to be added to section 703 would provide that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

H.R. 10199 also provides two amendments to Title 28 of the United States Code. Section 2 of the bill would amend Section 1331 to eliminate the current requirement that $10,000 damages be alleged before federal courts have general jurisdiction over federal questions. The amendment would grant jurisdiction to federal courts without regard to the amount in controversey whenever a federal question is litigated.

Section 3 of H.R. 10199 would amend Section 1391(e) of Title 28 to permit the joinder of third parties in litigation in which the federal government is a defendant.

I would like to emphasize again that none of the changes proposed by H.R. 10199 affects explicit limits on judicial review of agency action otherwise found in the statutes of the United States. Mr. Chairman, the recommendations contained in H.R. 10199 have been the subject of long and considered study and debate. I recommend the bill's enactment and I would be happy to respond to any questions.

Mr. FLOWERS. So, gentlemen, I have you listed in the following order: the American Bar Association, the Administrative Conference, and the Federal Administrative Law Judges Conference. So let us proceed. Mr. Ross and Mr. Gregory. Why don't you proceed with what additional comments you would like to make.

Mr. GREGORY. I would like to make but one general comment, which I think is important to make in addition to the written statement. This bill is properly known as the Sovereign Immunity bill and has been described properly as eliminating sovereign immunity as a defense in equitable actions against the United States. Because the phrase "sovereign immunity" has had a long history in this country both at the Federal and State level, I believe it is important to note that this bill is not an earth-shaking development of general application that would somehow change in full measure the concept of judicial review and agency action. To the contrary, it is a relatively limited proposal applying only to equitable actions not in actions involving allegations of money damages. In no respect would it eliminate additional defenses against the appropriateness of judicial review such as rightness.

For example, a situation where a case has not been properly presented. So that could be reviewed.

The bill ought to be looked at in accordance with only its precise effect and not debated on the general terminology of "sovereign immunity." I make this point—and I hope I don't overemphasize it because my experience in legislation is that through the press of time sometimes a debate can be held on a general concept which, while valid in itself, is perhaps not applicable to the precise legislation before the committee—but the bill is relatively simple in its terms. It is contained

in my statement. It was well set out in your statement upon introduction. The Administrative Conference comments on it. And I would limit myself to that general observation and would hope to participate in your discussion and answer any questions you might have.

Mr. FLOWERS. Thank you very much, sir.

Mr. Berg is with the Administrative Conference. We would be delighted to hear from you.

TESTIMONY OF RICHARD BERG, EXECUTIVE SECRETARY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Mr. BERG. Thank you. I am Richard Berg, executive secretary of the Administrative Conference. I don't have a prepared statement but we have submitted our commentary in some detail on all of these bills.

Mr. FLOWERS. Fine, that too will be placed in the record.

[The statement referred to follows.]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., December 2, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives, Washington, D.C.

DEAR CHAIRMAN RODINO: This is in response to your letter of October 20, requesting the comments of this Office with respect to H.R. 10194, H.R. 10195, H.R. 10196, H.R. 10197, H.R. 10198, and H.R. 10199, bills relating to improved administrative procedure.

The bills derive from consideration by the American Bar Association and by the Administrative Conference of certain proposals to amend the Administrative Procedure Act. The Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, establishes the general principles and requirements governing procedures in nearly all Federal agencies. Enacted in 1946, the APA has stood substantially unchanged since then, except for the enactment and subsequent amendment of the Freedom of Information Act, 5 U.S.C. § 552. (Section 3 of the Privacy Act of 1974 added to title 5 a new section 552a, but this is a self-contained provision, not functionally a part of the APA.)

In August, 1970, the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the APA. These resolutions were referred to the Administrative Law Section of the ABA for the preparation of implementing legislation.

Meanwhile the Administrative Conference initiated its own study of the ABA proposals. At its plenary session in June, 1973, the Conference adopted a comprehensive statement addressed to the ABA resolutions, which was amplified in some particulars by statements adopted at subsequent plenary sessions. (Copies enclosed.) Stated briefly, the Conference is in entire or substantial agreement with five of the ABA proposals, is noncommittal on one, and disagrees to a greater or lesser extent with five others. Regarding one of the twelve ABA resolutions relating to pretrial conferences, the Conference and the Administrative Law Section agree that legislation is not called for.

Over the past year my staff have worked with representatives of the ABA's Administrative Law Section in an effort to narrow areas of difference between the organizations' positions and to perfect legislative language to implement the various proposals. One result of this effort has been to group in separate bills those provisions on which the Conference and the ABA are in entire or substantial agreement, those on which we have alternative proposals, and those with respect to which we have "agreed to disagree." With this brief sketch of the background, I turn to the particular bills.

H.R. 10194 would implement two of the proposals on which there is entire agreement between the Bar Association and the Administrative Conference.

Section 1 would implement the ABA resolution calling for "providing improved definitions for rule and order which clearly distinguish the nature of rulemaking from the nature of adjudication." The purpose of the redefinition contained in

section 1 is to make the distinction between rulemaking and adjudication turn on whether the agency's action is of general or of particular applicability, rather than on whether it is of future or of retrospective effect. The general versus particular distinction seems more in accord with ordinary understanding and usage.

The Administrative Conference has endorsed the proposed redefinition, but on the understanding that those formal proceedings, particularly ratemaking, which have heretofore been subject to more flexible procedural requirements than ordinary formal adjudication in sections 554, 556 and 557 of the APA, should be permitted to retain such flexibility because of the strong policy component in these determinations. Section 1 does provide the necessary flexibility.

Subsection (a) amends the APA's definition of "rule" to exclude agency statements of particular applicability, *i.e.*, statements applicable to named or similarly specified parties, and to delete that part of the definition which classifies any agency approval or prescription for the future of rates, wages, corporate structures, etc., as a rule. The result will be to classify all actions of particular applicability as "orders" and the process for taking such actions as "adjudication."

Subsection (b) establishes a new classification, "ratemaking and cognate proceedings," defined to include the process for taking those actions which were previously specifically classified as rules but which under the revised definition of rule are or might be orders. This new classification is used elsewhere in the bill in order to permit the agencies to retain their present procedural flexibility under sections 556 and 557 of the APA in conducting such proceedings.

Subsections (c) and (d) would amend sections 556(d) and 557(b) to permit the continued use in ratemaking and cognate proceedings of two procedural devices available in rulemaking, submission of written evidence and omission of an initial or recommended decision of an administrative law judge.

Section 2 of H.R. 10194 is intended to narrow the present exemptions from the requirement in 5 U.S.C. 553 for notice and opportunity for public comment on proposed agency rules. The section would delete entirely the so-called proprietary exemption for matters relating to "public property, loans, grants, benefits, or contracts," and it would cut back the present exemption for rulemaking involving a military or foreign affairs function, so that the exemption would apply only to matters required to be kept secret in the interest of national defense or foreign policy. Agencies would, of course, continue to be able to dispense with notice and opportunity for comment on the basis of a specific finding that such public procedures are "impracticable, unnecessary, or contrary to the public interest." In addition, the bill would make it clear that such a finding may be made by rule with respect to a category of future rulemaking proceedings.

Section 2 would implement the second of the ABA resolutions as well as two formal recommendations of the Administrative Conference, Recommendations 69–8 and 73–5.

H.R. 10195 and *H.R. 10196* are alternative bills dealing with the problem of separation of functions. Section 554(d) of the Administrative Procedure Act now provides that an employee engaged in the performance of investigative or prosecutive functions for an agency may not participate in the decisionmaking process, except as witness or counsel, in the same or a factually related case. He cannot, in other words, participate first as an investigator or advocate and then turn around and act as decisionmaker or confidential adviser to the decisionmaker in the same case. This separation-of-functions requirement, however, is applicable only to certain classes of formal adjudications and it is not applicable at all to formal rulemaking.

The American Bar Association proposes to apply this provision across the board in all on-the-record proceedings governed by sections 556 and 557. H.R. 10195 would achieve this result. The Administrative Conference has endorsed the ABA approach with a single reservation: In those proceedings not now subject to section 554(d), the bar on participating or advising in the decision should not extend to agency officials who have not personally been involved in the case but who have general supervisory responsibility over employees who have participated in the case. In other words, the general counsel of any agency should not be disqualified from advising the agency members with respect to a formal rulemaking proceeding simply because attorneys in the general counsel's office participated in the hearing. H.R. 10196 would implement the Administrative Conference position with respect to this issue.

H.R. 10197 would implement five ABA resolutions which the Administrative Conference has declined to endorse. Section 1 is intended to implement ABA

Resolution No. 8, which calls for "conferring greater authority upon the presiding officer in the conduct of adjudicatory proceedings * * *." To that end section 1 would add to section 557(b) of the APA a new sentence empowering agencies to delegate to presiding employees and to agency appeal boards authority to make final decisions subject to review at the agency's discretion. The Administrative Conference agrees with this proposal, which we will consider further in our discussion of section 1 of H.R. 10198.

Section 1 of H.R. 10197 would also amend section 557(b) to narrow significantly the circumstances under which an agency may omit entirely the decision of the presiding officer. Section 557 now requires, in general, that where the agency head does not himself preside over the hearing, the presiding employee, ordinarily an administrative law judge, 5 U.S.C. § 556(b), or an employee qualified to preside, *i.e.*, another ALJ, must make an initial or recommended decision,[1] which is then subject to agency review. However, the last section of 557(b) provides that in certain circumstances the record may be directly certified to the agency for decision without an initial or recommended decision of the presiding officer:

"* * * [T]he presiding employee * * * shall first recommend a decision, except that in rulemaking[2] or determining applications for initial licenses—

"(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

"(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires."

Section 1 of H.R. 10197 would amend this sentence to eliminate entirely the authority of the agency to substitute for the presiding employee's decision a tentative decision of the agency itself or a recommended decision of a "responsible employee," *i.e.*, not necessarily an employee qualified to preside. Section 1 also attempts to narrow the circumstances under which an agency may dispense entirely with the preliminary decision by providing that an agency may do so only when it finds that "an expedited decision is imperatively and unavoidably required to prevent public injury or defeat of legislative policies."

These changes in the last sentence of section 557(b) are aimed at two distinct agency practices. First, in formal rulemaking proceedings in a number of agencies the presiding employee's decision is omitted in favor of a tentative decision of the agency or a recommended decision prepared by agency staff. This practice can be defended on the ground that where a case does not turn on questions of demeanor evidence (where, of course, a presiding officer's findings are uniquely valuable) and does raise novel questions of policy, a recommended decision which discloses the current thinking of the agency or its influential staff may be more valuable to the parties and more helpful in eliciting from them relevant comment than the decision of an administrative law judge. The practice of having the recommended decision prepared by agency staff was followed until recently in rate proceedings in the Federal Communications Commission, and we understand, is still followed in rulemaking proceedings in the Department of Agriculture, the Food and Drug Administration, and perhaps, in other agencies.

The second target of the amendment is the Interstate Commerce Commission's practice of omitting the ALJ decision in all rate suspension cases on the ground that the omission is necessary because Congress intended that such cases be finally decided within the statutory seven-month suspension period or as soon thereafter as feasible. An earlier version of the ABA's proposed amendment would have required that the finding as to the need for an expedited decision be made in each particular case. This would have struck more directly at the ICC's blanket determination of need. However, section 1 of H.R. 10197 would now permit an agency finding to be made with respect to "a specified category of proceedings" (page 2, lines 19–20), so that it is not clear whether the proposed amendment would in fact alter the ICC's practice.

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[1] An initial decision becomes a final decision if it is not appealed by one of the parties or reviewed at the instance of the agency. A recommended decision is one which must be reviewed by the agency. There is little practical distinction between an initial and a recommended decision, and an agency is free to direct the presiding employee to make either one.

[2] It should be noted that section 1(d) of H.R. 10194 would insert before "rulemaking" the words "ratemaking and cognate proceedings," a conforming change necessitated by the narrower definition of "rule."

The Administrative Conference considered the legislative proposal to implement ABA Resolution No. 8 [3] at its June, 1973 and May, 1974 plenary sessions. Our current position is set forth in the attached statement on Resolution No. 8 adopted in May, 1974. Although we agree in general with the ABA's desire to encourage intermediate decisions by presiding employees, we are not prepared to endorse the proposed restriction on agency authority to omit the decision in appropriate circumstances. In Paragraph (d) of our statement, we say:

"d. In ratemaking, initial licensing and rulemaking, fact issues turning upon credibility and demeanor are not often central. Since the need for expedition may outweigh the value of an intermediate decision in some such proceedings, agencies should be authorized to omit the intermediate decision, either on a case-by-case basis or by a determination applicable to a specifically defined category of proceedings. In other such proceedings it may be useful for the agency to supply for party comments its own tentative decision or the recommended decision of a responsible agency employee other than the presiding administrative law judge."

Accordingly, we oppose section 1 insofar as it amends the last sentence of section 557(b).

Section 2 of H.R. 10197 would implement ABA Resolution No. 5, which calls for uniform rules of agency procedure in formal adjudication. Section 2 would add a new subsection to section 575 of the Administrative Conference Act, authorizing the Conference to establish from its membership a Committee on Uniform Rules to prepare uniform procedural rules to be used in proceedings subject to section 554 of the APA. Such rules, unless disapproved by a majority vote of the Conference membership, would be binding on the agencies, but the Chairman of the Conference, with the approval of the Committee, could grant waivers.

The Conference opposes this proposal. Although our statement addressed to Resolution No. 5 endorses the principle of uniform procedures, "where considerations of fairness or expedition do not justify differences," we do not "desire a statutory mandate to enforce the single goal of uniformity with respect to particular provisions of administrative law, but would prefer to further * * * all the values of sound administrative procedure—including the value of uniformity—by making recommendations in those areas where the need and the utility of Conference action are most apparent." In short, we do not believe that pursuit of the goal of procedural uniformity for its own sake would represent a wise use of Conference resources.

Section 3 of H.R. 10197 would prohibit ex parte communications between agency decisionmaking personnel and interested persons outside the agency. Although the Administrative Procedure Act contains a limited prohibition of ex parte communications in section 554(d), the subject is largely governed by agency rules. The Conference statement on the ABA resolution agreed that ex parte communications should be prohibited, but took no position as to whether the prohibition should be effected by statute or left to agency rule. Accordingly, we take no position on section 3.

Section 4 of the bill would amend section 554 to authorize use of "abridged hearing procedures" where all parties consent thereto. The Conference opposes this provision on the ground that it would not accord the agencies any authority they do not now possess and that it might be construed to withdraw existing authority to employ expedited procedures in the absence of unanimous consent.

Section 5 of the bill would implement ABA Resolution No. 12, which is addressed to prejudicial agency publicity. Section 5 would add a new section 560 to the APA, forbidding agency personnel to make public statements or news releases concerning pending investigations or proceedings which evidence prejudicial bias or otherwise harm any person in his business, property, or reputation, except, in the latter case, where the benefit to the public clearly outweighs the harm to the affected person. Judicial relief would be available for violation of the prohibition and might include setting aside the agency action in the relevant proceeding.

The Conference has expressed its opposition to this proposal on the ground that "there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding." Agency publicity which injures a person in his business, property, or reputation presents a different problem, but one for which the judicial relief provided by section 5 affords

[3] The text of this proposal has undergone a number of revisions.

only a limited remedy. The Conference has issued its own recommendation on the subject, Recommendation No. 73–1, which sets forth criteria which the agencies should apply in handling publicity relating to investigations and pending proceedings.

H.R. 10198 would implement the remaining two ABA resolutions on which the ABA and the Conference have achieved agreement. Section 1 would add a new subsection (d) to section 557 of the APA, authorizing agencies conducting formal proceedings—rulemaking or adjudication—under sections 556 and 557 of the APA to establish appeal boards, made up of agency employees, to review decisions of administrative law judges. It would further authorize the agency to delegate final decisional authority to such boards or to the administrative law judges, subject to discretionary, so-called certiorari-type, review by the agency.

One of the common criticisms of regulatory agencies today is that they are so caught up in the problems of processing and resolving individual cases that they do not have adequate time or energy left for considering the broader questions of regulatory policy. In order to free the agency members of the burden of deciding routine cases, both the ABA and the Conference have recommended that the agencies have authority to delegate final decisions to appeal boards or to the presiding administrative law judge, subject to the agency's right to review cases which appear to the agency to present important issues. Many agencies, among them the ICC, the FCC, and the CAB, have such authority already, either by statute or by reorganization plan. This bill would make a general grant of authority in connection with proceedings governed by sections 556 and 557.

The third and fourth sentences of proposed subsection (d) were not contained in the agreed ABA-Conference draft bill. The third sentence provides (1) that members of appeal boards shall be in a grade classification or salary level commensurate with their duties and in no event less than that of the employees whose actions are to be reviewed; and (2) that they not be removable from appeal boards except in the manner provided for hearing examininers, *i.e.*, only for good cause, as determined by the Civil Service Commission on the record after hearing, 5 U.S.C. § 7521. The fourth sentence provides that review board members not be subject to the supervision or direction of any officer or employee engaged in the performance of investigative or prosecuting functions.

The fourth sentence's provision for the organizational separation of the appeal board from the investigative and prosecuting arms of the agency is consistent with Paragraph 2(a)(8) of Conference Recommendation No. 68–6 and with the present statutory provision governing the employee review board of the Federal Communications Commission, 47 U.S.C. § 155(d)(8). We favor this provision.

The substance of the third sentence was not addressed either in Recommendation No. 68–6 nor in the Conference statement on the ABA Resolutions. Accordingly, the views I express on this part of H.R. 10198 are my own and not necessarily those of the Conference. I believe that the provisions of the third sentence would constitute an undesirable limitation on the discretion which agencies should have in setting up and staffing appeal boards. It is true that, as a general rule, members of such boards should be at least equivalent in grade to the officers whose decisions they are reviewing. (It is not clear whether the third sentence would require that the board members be at least equal to the presiding employees in *both* grade and salary or in *either* grade or salary.) It is at least equally important, however, that the board members possess the confidence of the agency head or heads, since the appeal board will frequently serve as the finds decisional authority within the agency, and thus, in a manner of speaking, as the alter ego of the agency itself. Therefore, the agency should have broad discretion in its selection of members of an appeal board. There may be occasions in which an agency desires to place on the board an employee junior in grade to some or all of the presiding employees. I am not persuaded that an agency ought to be prohibited from doing so.[4]

The proposal that appeal board members be subject to the same protections against removal as administrative law judges strikes me as highly undesirable and likely to defeat the purpose behind creating such boards. The need for the independence of the presiding officer at the initial decisional level is based on his broad discretionary authority in assembling the record and conducting the

[4] It must be borne in mind that an agency may not be able to provide for all board members the same grades as ALJ's because of limitations on the number of super grades available Goverment-wide. Furthermore, the skills demanded of an ALJ and an appeal board member are not necessarily the same.

proceedings and his unique role as a finder of fact. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493–97 (1951). By contrast, the appeal board reviews the case on the record made before the ALJ, and its principal tasks are to apply to that case the law and policies already formulated by the agency and, to the extent possible, to anticipate and contribute to the development of new policy. Whatever their individual merits and skills, appeal board members who are "out of tune" with agency thinking are of little value in easing the decisional burden on the agency heads, and this, after all, is the basic purpose for which such boards are established. Accordingly, I believe that agencies should have some flexibility in prescribing the tenure of appeal board members.

It should be noted that the third sentence of proposed section 557(d) would apply to existing as well as newly created appeal boards. Neither the statutory provisions governing appeal boards in the Interstate Commerce Commission, 49 U.S.C. § 17, nor in the Federal Communications Commission, 47 U.S.C. § 155(d), provide that board members may be removed only for cause. This provision would alter the practice in these as well as in other agencies, which now have appeal boards. I recommend deletion of the third sentence in proposed section 557(d).

Section 2 of H.R. 10198 relates to agency subpena power. The Administrative Procedure Act does not at present contain a grant of subpena power, but provides (§ 555(d)) that where agency subpena power exists, subpenas must be made available to private parties in adversary proceedings to the same extent that they are available to agency counsel. Most agencies which conduct proceedings under sections 556 and 557 of the APA do have subpena power. The purpose of section 2 is to fill existing gaps by providing within the APA a grant of subpena power for all agency proceedings, both rulemaking and adjudication, which are governed by sections 556 and 557.

Subsection (a) would amend section 555(d) of the APA to require agencies to delegate to presiding officers in all proceedings subject to section 556 the authority to sign and issue subpenas. Such authority would continue to be exercised "subject to published rules of the agency and within its powers," § 556(c)(2), but the agency could not by such a rule withhold the authority entirely. This amendment is intended to clarify existing law. See Attorney General's Manual on the Administrative Procedure Act (1947) 74–75.

Subsection (b) adds a new subsection to section 556, granting subpena power to agencies for use in any proceeding to which sections 556 and 557 are applicable, *i.e.*, any proceeding required by statute to be on the record with opportunity for an agency hearing. This grant of subpena power is "in addition to and not in limitation of" any other statutory authority which an agency may have to issue or to enforce subpenas. Where such other authority is adequate for an agency's purposes, the agency need not rely on this provision and will not be affected by it. Conversely, the subpena power granted by proposed section 556(d) is independent and self-contained; where any agency has at present a subpena power which is limited or inadequate in some respect, it may rely instead on the power granted by this provision.

Section 2 would implement ABA Resolution No. 10 and Recommendation No. 74–1 of the Administrative Conference. The text of section 2 differs from the text proposed in Recommendation 74–1, only in that it deletes from the third sentence of proposed section 556(d) the words "through the Attorney General unless otherwise authorized by law" and adds instead a new sentence reading: "Unless otherwise authorized by law, the Attorney General shall represent the agency in appeals from district court decisions granting or denying enforcement of subpenas."

The text proposed by Recommendation 74–1 was intended neither to grant nor to withhold from the agencies authority to conduct litigation, but merely to refer to existing law. When an agency seeks judicial enforcement of a subpena under section § 556(d) it would be required to proceed through the Attorney General "unless otherwise authorized by law." This is consistent with the general principle that conduct and supervision of agency litigation is in the Department of Justice "except as otherwise authorized by law," 28 U.S.C. §§ 516, 519. Some agencies do, of course, have specific authority to conduct their own litigation, see *F.T.C.* v. *Guignon*, 390 F. 2d 323, 324–25 (8th Cir. 1968), and such authority would, under the Conference's language, be applicable in accordance with its terms to subpena enforcement proceedings. The effect of the revised text contained in H.R. 10198 is not at all clear, but the intent seems to be to permit

agencies to conduct their own litigation at the district court level and to authorize the Department of Justice to control litigation at the appellate levels. We have a number of problems with the revision, the most serious of which is that it would raise questions as to who controls litigation under existing subpena statutes. It must be emphasized that proposed section 556(d) is a grant of subpena power "in addition to and not in limitation of" any other statutory authority which an agency may have to issue or to enforce subpenas. Therefore, our text avoids any language which might be construed as applicable to agency subpenas issued under other statutory authority. The problem of control of agency litigation is somewhat complicated, and we do not think that this fairly narrow provision regarding subpena power is the place to resolve it. Therefore, we recommend that the text of section 556(d) contained in Recommendation 74–1 be substituted for that in H.R. 10198.

H.R. 10199 would remove certain technical obstacles to suits for judicial review of Federal administrative actions by (1) eliminating the doctrine of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review, (2) eliminating the requirement of $10,000 jurisdictional amount in a narrow category of Federal-question cases in United States district courts; and (3) removing technical complexities concerning the naming of the party defendant in actions challenging Federal administrative action. The bill would implement Recommendations 69–1, 68–7, and 70–1, respectively, of the Administrative Conference of the United States.

Section 1 would amend section 702 of title 5, U.S. Code, to eliminate the defense of sovereign immunity with respect to any action in a court of the United States seeking relief other than money damages and based on an assertion of unlawful official action by a Federal officer or employee. The amendment would not affect other limitations on judicial review, such as that plaintiff lacks standing to challenge the agency action, that the action is not ripe for review, or that the action is committed to unreviewable agency discretion, nor would it confer authority to grant relief where another statute limits relief for the action to a suit for money damages. Section 1 would also amend section 703 of title 5, U.S. Code to permit the plaintiff in actions for non-statutory review of administrative action to name the United States, the agency, or the appropriate officer as defendant. This is intended to eliminate technical problems arising from plaintiff's failure to name the proper Government officer as defendant.

Section 2 would amend section 1331 of title 28, U.S. Code, to eliminate the requirement that there be at least $10,000 in controversy where the jurisdiction of the U.S. district court is invoked on the ground that the matter arises under Federal law. This would eliminate an obstacle to judicial review in situations where the right asserted is not susceptible of dollar valuation.

Section 3 would amend section 1391(e) of title 28, U.S. Code, which governs venue of actions against Federal officers and agencies, to make it clear that a plaintiff may utilize that section's provisions for broad venue and extra-territorial service of process against Government defendants notwithstanding the presence in the action of a non-federal defendant. This is probably already the law, see *Macias* v. *Finch*, 324 F. Supp. 1252, 1254–55 (N.D. Cal. 1970); *People of Saipan* v. *Dept. of the Interior*, 356 F. Supp. 645, 651 (D. Hawaii 1973), modified on other grounds, 502 F. 2d 90 (9th Cir. 1974), but a clarifying amendment would be desirable.

This bill does not derive directly from the ABA Resolution regarding amendments to the Administrative Procedure Act. However, because its proposals relate closely to the APA and have received Bar Association and Conference support in the past, it seems appropriate to consider them together with the other bills in this package.

I enclose the texts of the Conference's statements on the ABA resolutions and of the Conference recommendations cited in this letter.

Sincerely yours,

ROBERT A. ANTHONY, *Chairman.*

Enclosures.

Recommendation No. 68-6—Delegation of Final Decisional Authority Subject to Discretionary Review by the Agency[1]

RECOMMENDATION

1. In order to make more efficient use of the time and energies of agency members and their staffs, to improve the quality of decision without sacrificing procedural fairness, and to help eliminate delay in the administrative process, every agency having a substantial caseload of formal adjudications should consider the establishment of one or more intermediate appellate boards or the adoption of procedures for according administrative finality to presiding officers' decisions, with discretionary authority in the agency to affirm summarily or to review, in whole or in part, the decisions of such boards or officers.

2. Section 8 of the Administrative Procedure Act, 5 U.S.C. 557, should be amended as necessary to clarify the authority of agencies to restructure their decisional processes along either of the following lines:

(*a*) *Intermediate appellate boards*

(1) Whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by rule or order:

(A) Establish one or more intermediate appellate boards consisting of agency employees qualified by training, experience, and competence to perform review functions,

(B) Authorize these boards to perform functions in connection with the disposition of cases of the same character as those which may be performed by the agency,

(C) Prescribe procedures for review of subordinate decisions by such boards or by the agency, and

(D) Restrict the scope of inquiry by such boards and by the agency in any review, without impairing the authority of the agency in any case to decide on its own motion any question of procedure, fact, law, policy, or discretion as fully as if it were making the initial decision.

(2) Any order or decision of an intermediate appellate board, unless reviewed by the agency, shall have the same force and effect and shall be made, evidenced, and enforced in the same manner as orders and decisions of the agency.

(3) A party aggrieved by an order of such board may file an application for review by the agency within such time and in such manner as the agency shall prescribe, and every such application shall be passed upon by the agency.

(4) In passing upon such applications for review, an agency may grant, in whole or in part, or deny the application without specifying any reasons therefor. No such application shall rely upon questions of fact or law upon which the intermediate appellate board has been offorded no opportunity to pass.

(5) An agency, on its own initiative, may review in whole or in part, at such time and in such manner as it shall determine, any order, decision, report, or other action made or taken by an intermediate appellate board.

(6) If an agency grants an application for review or undertakes review on its own motion, it may affirm, modify, reverse, or set aside the order, decision, report or other action of the intermediate appellate board, or may remand the proceeding for reconsideration.

(7) The filing of an application for agency review shall be a condition precedent to judicial review of any order of an intermediate appellate board.

(8) Agency employees performing review functions shall not be responsible to or subject to the supervision or direction of any employee or agent engaged in the performance of investigative or prosecuting functions for any agency.

(*b*) *Discretionary review of decisions of presiding officers*

(1) When a party to a proceeding seeks administrative review of an initial decision rendered by the presiding officer (or other officer authorized by law to make such decision), the agency may accord administrative finality to the initial decision by denying the petition for its review, or by summarily affirm-

[1] Adopted Second Plenary Session—December 10–11, 1968.

ing the initial decision, unless the party seeking review makes a reasonable showing that:

(A) A prejudicial procedural error was committed in the conduct of the proceeding, or

(B) The initial decision embodies (i) a finding or conclusion of material fact which is erroneous or clearly erroneous, as the agency may by rule provide; (ii) a legal conclusion which is erroneous; or (iii) an exercise of discretion or decision of law or policy which is important and which the agency should review.

(2) The agency's decision to accord or not to accord administrative finality to an initial decision shall not be subject to judicial review. If the initial decision becomes the decision of the agency, however, because it is summarily affirmed by the agency or because the petition for its review is denied, such decision of the agency will be subject to judicial review in accordance with established law.

SECOND PLENARY SESSION, DECEMBER 10–11, 1968—WASHINGTON, D.C.

RECOMMENDATION NO. 68–7—ELIMINATION OF JURISDICTIONAL AMOUNT REQUIREMENT IN JUDICIAL REVIEW

Recommendation

Title 28 of the United States Code should be amended to eliminate any requirement of a minimum jurisdictional amount before United States district courts may exercise original jurisdiction over any action in which the plaintiff alleges that he has been injured or threatened with injury by an officer or employee of the United States or any agency thereof, acting under color of Federal law. This amendment is not to affect other limitations on the availability or scope of judicial review of Federal administrative action.

RECOMMENDATION NO. 69–1—STATUTORY REFORM OF THE SOVEREIGN IMMUNITY DOCTRINE.[1]

The technical legal defense of sovereign immunity, which the Government may still use in some instances to block suits against it by its citizens regardless of the merit of their claims, has become in large measure unacceptable. Many years ago the United States by statute accepted legal responsibility for contractual liability and for various types of misconduct by its employees. The "doctrine of sovereign immunity" should be similarly limited where it blocks the right of citizens to challenge in courts the legality of acts of governmental administrators. To this end the Administrative Procedure Act should be amended.

RECOMMENDATION

1. Section 702 of title 5, United States Code (formerly section 10(a) of the Administrative Procedure Act), should be amended by adding the following at the end of the section:

An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

2. Section 703 of title 5, United States Code (formerly section 10(b) of the Administrative Procedure Act), should be amended by adding the following sentence after the first full sentence:

If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer.

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[1] Adopted October 21–22, 1969.

Recommendation No. 69–8—Elimination of Certain Exemptions from the APA Rulemaking Requirements

Recommendation

In order to assure that Federal agencies will have the benefit of the information and opinion that can be supplied by persons whom regulations will affect, the Administrative Procedure Act requires that the public must have opportunity to participate in rulemaking proceedings. The procedures to assure this opportunity are not required by law, however, when rules are promulgated in relation to "public property, loans, grants, benefits, or contracts." These types of rules may nevertheless bear heavily upon nongovernmental interests. Exempting them from generally applicable procedural requirements is unwise. The present law should therefore be amended to discontinue the exemptions to strengthen procedures that will make for fair, informed exercise of rulemaking authority in these as in other areas.

Removing these statutory exemptions would not diminish the power of the agencies to omit the prescribed rulemaking procedures whenever their observances were found to be impracticable, unnecessary, or contrary to the public interest. A finding to that effect can be made, and published in the Federal Register, as to an entire subject matter concerning which rules may be promulgated. Each finding of this type should be no broader than essential and should include a statement of underlying reasons rather than a merely conclusory recital.

Wholly without statutory amendment, agencies already have the authority to utilize the generally applicable procedural methods even when formulating rules of the exempt types now under discussion. They are urged to utilize their existing powers to employ the rulemaking procedures provided by the Administrative Procedure Act, whenever appropriate, without awaiting a legislative command to do so.

Recommendation No. 70–1 Parties Defendant[1]

The size and complexity of the Federal Government, coupled with the intricate and technical law concerning official capacity and parties defendant, have given rise to innumerable cases in which a plaintiff's claim has been dismissed because the United States or one of its agencies or officers lacked capacity to be sued, was improperly identified, or could not be joined as a defendant. The ends of justice are not served when dismissal on these technical grounds prevents a determination on the merits of what may be just claims. Three attempts to cure the deficiencies of the law of parties defendant have achieved only partial success and further changes are required to eliminate remaining technicalities concerning the identification, naming, capacity, and joinder of parties defendant in actions challenging federal administrative action.

Recommendation

1. The Federal Rules of Civil Procedure contain liberal provisions for substitution of parties and for amendment of pleadings and correction of defects as to parties defendant. The Department of Justice should instruct its lawyers and United States Attorneys to call the attention of the court to these provisions in cases involving technical defects with respect to the naming of parties defendant in any situation in which the plaintiff's complaint provides fair notice of the nature of the claim and the summons and complaint were properly served on a United States Attorney, the Attorney General, or an officer or agency which would have been a proper party if named. The Department of Justice should be responsible for determining who within our complex federal establishment is responsible for the alleged wrong and should take the initiative in seeking correction of pleadings or adding of proper parties. Since the Department of Justice has acquiesced in the substance of this recommendation, it would also be appropriate for the Department of Justice and the Administrative Conference of the United States to seek an amendment of the Federal Rules of Civil Procedure to provide that the Attorney General shall have the responsibility to correct such deficiencies.

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[1] Recommendations Nos. 18–22 were adopted June 2–3, 1970.

2. Congress should enact legislation:

(a) Amending section 703 of title 5 to allow the plaintiff to name as defendant in judicial review proceedings the United States, the agency by its official title, the appropriate officer, or any combination of them.

(b) Amending section 1391 (e) of title 28 to include within its coverage actions challenging federal administrative action in which the United States is named as a party defendant, without affecting special venue provisions which govern other types of actions against the United States.

(c) Amending section 1391 (e) of title 28 to allow a plaintiff to utilize that section's broadened venue and extraterritorial service of process in actions in which non-federal defendants who can be served in accordance with the normal rules governing service of process are joined with federal defendants.

Recommendation 73-1—Adverse Agency Publicity

(Adopted June 8, 1973)

Adverse agency publicity—that is, statements made by an agency or its personnel which invite public attention to an agency's action or policy and which may adversely affect persons identified therein [1]—can cause serious and sometimes unfair injury. Where a reasonable and equally effective alternative is not available, adverse agency publicity is often necessary to warn of a danger to public health or safety or a threat of significant economic harm, or to serve other legitimate public purposes. However, adverse agency publicity is undesirable when it is erroneous, misleading or excessive or it serves no authorized agency purpose.

Agency practices regarding adverse publicity vary widely. Some agencies use adverse publicity as the primary method of enforcement; for some others it is merely action incidental to formal sanctions. Agency rules seldom establish procedures or standards for the use of adverse agency publicity, and it is almost never subject to effective judicial review.

In meeting these concerns, this recommendation addresses agency use of adverse publicity in connection with investigatory, rulemaking and agency adjudicatory processes as well as informal agency actions. It recommends the adoption of agency rules containing minimum standards and structured practices governing the issuance of publicity.

Recommendation

Each agency should state in its published rules the procedures and policies to be followed in publicizing agency action or policy, and internal operating practices should assure compliance. In the adoption of such procedures and policies, each agency should balance the need for adequately serving the public interest and the need for adequately protecting persons affected by adverse agency publicity in accordance with the following standards:

1. All adverse agency publicity should be factual in content and accurate in description. Disparaging terminology should be avoided.

2. Adverse agency publicity relating to regulatory investigations of specifically identified persons or pending agency trial-type proceedings should issue only in limited circumstances in accordance with the criteria outlined below.

(a) Where an agency determines that there is a significant risk the public health or safety may be impaired or substantial economic harm may occur unless the public is immediately notified, it may use publicity as one of the means of speedily and accurately notifying the affected public. However, where public harm can be avoided by immediate discontinuance of an offending practice, a respondent should be allowed an opportunity, where feasible, to cease the practice (pending a legal test) in lieu of adverse agency publicity.

(b) Where it is required in order to bring notice of pending agency adjudication to persons likely to be desirous of participating therein or likely to be affected by that or a related adjudication, the agency should rely on publicity

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[1] Publicity as used here is distinguished from the mere decision to make records available to the public rather than preserve their confidentiality. That decision is governed by separate criteria set forth in the Freedom of Information Act (5 U.S.C. § 552) and is not within the scope of this recommendation.

to the extent necessary to provide such notice even though it may be adverse to a respondent.

(c) Where information concerning adverse agency action is available to the public regardless of agency publicity measures and is likely to result in media publicity, adverse agency publicity should be issued only to the extent necessary to foster agency efficiency, public understanding, or the accuracy of news coverage.

3. Adverse agency publicity not included in paragraph 2 above should issue only after the agency has taken reasonable precautions to assure that the information stated is accurate and that the publicity fulfills an authorized purpose.

4. Where information in adverse agency publicity has a limited basis—for example, allegations subject to subsequent agency adjudication—that fact should be prominently disclosed. Any respondent or prospective respondent in an agency proceeding should, if practicable and consistent with the nature of the proceeding, be given advance notice of adverse agency publicity relating to the proceeding and a reasonable opportunity to prepare in advance a response to such publicity.

5. Where adverse agency publicity is shown to be erroneous or misleading and any person named therein requests a retraction or correction, the agency should issue the retraction or correction in the same manner (or as close thereto as feasible) as that by which the original publicity was disseminated.

Recommendation 73-5—Elimination of the "Military or Foreign Affairs Function" Exemption From APA Rulemaking Requirements.

(Adopted December 18, 1973)

The basic principle of the rulemaking provisions of the Administrative Procedure Act—that an opportunity for public participation fosters the fair and informed exercise of rulemaking authority—is undercut by various categorical exemptions in 5 U.S.C. § 553(a). More than 25 years' experience with rulemaking under the APA has shown some of these broad exemptions to be neither necessary nor desirable. The Administrative Conference has previously recommended elimination of the exemptions for matters "relating to public property, loans, grants, benefits, or contracts" (Recommendation 69-8, October 22, 1969). Since rules on those subjects may bear heavily on nongovernmental interests, the Conference concluded that their categorical exemption from generally applicable procedural requirements was unwise. For similar reasons, the breadth of the present exemption for all rules which involve a "military or foreign affairs function" is unwarranted.

As with the earlier Recommendation, elimination of the categorical exemption for military or foreign affairs functions would not diminish the power of the agencies to omit APA rulemaking procedures when their observance is found to be impracticable, unnecessary, or contrary to the public interest, or when other exemptions contained in Section 553 are applicable, such as those for "general statements of policy" or for rules relating to "agency management or personnel." In addition, the present Recommendation would retain limited exemptive provisions specially directed to the needs of military and foreign affairs rulemaking.

Recommendation

(1) The APA's categorical exemption for "military or foreign affairs function" rulemaking should be eliminated.

(2) Two aspects of special concern in the military and foreign affairs areas should be dealt with by modified exemptive provisions in place of the present categorical one:

(a) Rulemaking in which the usual procedures are inappropriate because of a need for secrecy in the interest of national defense or foreign policy should be exempted on the same basis now applied in the freedom of information provision, 5 U.S.C. § 552(b)(1). That is, Section 553(a) should contain an exemption for rulemaking involving matters specifically required by Executive order to be kept secret in the interest of national defense or foreign policy.

(b) Some of the agencies affected by elimination of the categorical exemption issue numerous rules for which public procedures would be inappropriate or unnecessary. Such agencies would find it burdensome to make case-by-case find-

ings that the usual procedures are "impracticable, unnecessary, or contrary to the public interest" under Section 553(b)(B). Repeal of the categorical exemption for "military or foreign affairs functions" should not be construed to discourage use of the implicit power to apply the Section 553(b)(B) exemption on an advance basis to narrowly drawn classes of military or foreign affairs rulemaking. It is therefore recommended that repeal of the exemption be accompanied by statutory clarification of the agencies' power to prescribe by rule specified categories of rulemakings exempt by reason of Section 553(b)(B), provided that the appropriate finding and a brief statement of reasons are set forth with respect to each category. Though it would not be mandatory, agencies should consider using notice-and-comment procedures for adoption of the exemptive rule itself. Statutory amendment should also amplify the existing Section 553(b)(B) standards for exemption by including specific reference to the national interest in the military-foreign affairs area.[1]

(3) Wholly without statutory amendment, agencies already have the authority to use the generally applicable APA procedures for rulemaking when formulating rules of the exempt types. They are urged to do so, wherever appropriate, in matters now excluded by the "military or foreign affairs function" exemption.

APPENDIX

Section 553(a) and the relevant part of 553(b), amended in accordance with this recommendation, might read as follows:

"§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a matter pertaining to a military or foreign affairs function of the United States specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy; or

(2) a matter relating to agency management or personnel [or to public property, loans, grants, benefits, or contracts][2]

(b) * * *

Except when notice or hearing is required by statute, this subsection does not apply—

* * * * * * *

(B) when the agency for good cause finds that notice and public procedure thereon would be impracticable, unnecessary, or contrary to the public interest (including national interest factors if a military or foreign affairs function is involved). The agency shall incorporate in each rule issued in reliance upon this provision either (i) the finding and a brief statement of reasons therefor, or (ii) a statement that the rule is within a category of rules established by a specified rule which has been previously published and for which the finding and statement of reasons have been made.

RECOMMENDATION 74–1 SUBPENA POWER IN FORMAL RULEMAKING AND ADJUDICATION

(Adopted May 30–31, 1974)

The present recommendation implements, and somewhat expands, the statement of principle adopted by the Conference in June 1973 with respect to the American Bar Association's Resolution No. 10 concerning proposed amendments to the Administrative Procedure Act. It speaks only to the issue of subpena authority in formal proceedings under the Administrative Procedure Act, and does not reflect any judgment as to the need for general or specific grants of subpena authority in other situations.

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[1] An Appendix to this recommendation sets forth suggested language to effect the changes recommended by paragraph (2).

[2] Recommendation 69–8 proposes the deletion of the bracketed phrase.

RECOMMENDATION

The Administrative Procedure Act should be amended (1) to make agency subpenas available in all agency proceedings, both rulemaking and adjudication, which are subject to sections 556 and 557 of title 5, United States Code, and (2) to make clear that the power to issue subpenas in such proceedings shall be delegated to presiding officers.

We propose the following amendments to implement this recommendation:

1. Amend section 555(d) of title 5, United States Code to read as follows:

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. Each agency shall designate by rule the officers, who shall include the presiding officer in all proceedings subject to section 556 of this title, authorized to sign and issue subpenas. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

2. Amend section 556 of title 5, United States Code to add the words "subpena authority;" in the heading after the words "powers and duties;", to delete the words "authorized by law" in subparagraph (c)(2), to redesignate subsections (d) and (e) as (e) and (f) respectively, and to add the following subsection (d):

(d) In any proceeding subject to the provisions of this section, the agency is authorized to require by subpena any person to appear and testify or to appear and produce books, papers, documents or tangible things, or both, at a hearing or deposition at any designated place. Subpenas shall be issued and enforced in accordance with the procedures set forth in section 555(d) of this title. In case of failure or refusal of any person to obey a subpena, the agency, through the Attorney General unless otherwise authorized by law, may invoke the aid of the district court of the United States for any district in which such person is found or resides or transacts business in requiring the attendance and testimony of such person and the production of him by books, papers, documents or tangible things. The authority granted by this subsection is in addition to and not in limitation of any other statutory authority for the issuance of agency subpenas and for the judicial enforcement thereof.

ADMINISTRATIVE CONFERENCE STATEMENT ON ABA PROPOSALS TO AMEND THE ADMINISTRATIVE PROCEDURE ACT

(Adopted June 7–8, 1973)

In August, 1970 the House of Delegates of the American Bar Association adopted twelve resolutions calling in general terms for amendments to the Administrative Procedure Act. They are a valuable means of focusing the attention of the Administrative Conference, the organized bar, and other interested persons upon revisions and improvements in the APA suggested by a quarter-century of experience.

The Conference has studied the resolutions and the implementing recommendations prepared by the Administrative Law Section of the ABA. The Conference has expressed its views in recommendations previously adopted respecting the subject matter of several of the resolutions. We believe it desirable, however, to state in a single document our views on the resolutions and on those parts of the implementing recommendations which appear to raise issues separate from those posed by the resolutions.

RESOLUTION NO. 1

The Conference approves in principle Resolution No. 1, calling for improved definitions of "rule' and "order" so as to distinguish clearly between the nature of rulemaking and the nature of adjudication. The Conference has commenced, and will continue, the further study that is needed to determine how this can most effectively be achieved.

RESOLUTION NO. 2

The Conference agrees with Resolution No. 2. We have previously called for eliminating from 5 U.S.C. § 553 the exemption for rules relating to "public property, loans, grants, benefits, or contracts" (Recommendation No. 69–8). We also favor limiting or eliminating the present exemption that applies whenever a military or foreign affairs function is involved, provided that appropriate safeguards can be retained to protect the aspects of those functions that concededly need special treatment. This subject deserves further study, which the Conference has already begun.

RESOLUTION NO. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. § 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing and formal rulemaking generally would be eliminated. With respect to such formal proceedings, the Conference approves this proposal insofar as it applies to agency staff who have actually engaged in investigative or prosecutorial functions in the particular proceeding, including persons who have actually exercised supervisory authority over such functions once the formal phase of the proceeding has commenced. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. § 554(d).

RESOLUTION NO. 4

The Conference approves the purpose of Resolution No. 4, which seeks the prohibtion of *ex parte* communications between agency members and parties or other interested persons outside the agency on any fact in issue in an adjudicatory or rulemaking proceeding subject to 5 U.S.C. §§ 556 and 557. We leave open for further consideration by the Council and cognizant committees whether this objective can most effectively be sought by legislation or by agency rules.

RESOLUTION NO. 5

As the numerous Conference recommendations of general applicability indicate, the Conference endorses the principle of uniformity of administrative procedures—including procedures governing the conduct of formal adjudication—where considerations of fairness or expedition do not justify differences. It is extremely difficult to determine, however, where such considerations are widely applicable without an intensive agency-by-agency examination of the particular procedure in question. As a matter of priority, the advantages to be gained by seeking standardization through agency-by-agency examination of a procedure whose only apparent flaw may be its nonuniformity are not always as important as improvement of some procedures whose actual operation has been shown to be defective. The work involved, and hence the opportunity cost, becomes even greater if the uniform procedure is to be not merely recommended but imposed, making it necessary to pass upon exceptions for particular agencies. For these reasons, the Conference would not desire a statutory mandate to enforce the single goal of uniformity with respect to particular provisions of administrative law, but would prefer to further, as it has in the past, all the values of sound administrative procedure—including the value of uniformity—by making recommendations in those areas where the need and the utility of Conference action are most apparent.

RESOLUTION NO. 6

The Conference has already called for agencies to consider delegating final decisional authority to presiding officers or to intermediate appellate boards, subject to discretionary review by the agency (Recommendation 68–6). ABA Resolution No. 6 and that part of its Recommendation No. 8 which authorizes such delegation are consistent with and would implement the Conference recommendation, and we endorse them.

RESOLUTION NO. 7

Resolution No. 7 would require agencies "to the extent practicable and useful" to provide by rule for prehearing conferences. The Conference has already endorsed the principal objective of this resolution, which is increased use of prehearing conferences in adjudicatory proceedings (Recommendation 70–4). We agree with the conclusion expressed in ABA Recommendation No. 7 that pursuit of this objective is best conducted through the Conference.

RESOLUTION NO. 8

The Conference agrees that the presiding officer should have substantial authority in the conduct of adjudicatory proceedings. The Conference has already recommended legislation to authorize agencies, at their discretion, to accord administrative finality to the decisions of administrative law judges (Recommendaton 68–6). We endorse the ABA proposal insofar as it would achieve that result.

The Conference shares the Association's view that an Administrative Law Judge who has presided over the reception of evidence should exercise responsibility for rendering the initial decision, with limited exceptions. The specification of those exceptions and other matters set forth in the ABA's implementing recommendation raise issues which the Chairman's Office of the Conference and the Commitee on Agency Organization and Personnel have studied in some depth and discussed with the relevant committee of the Administrative Law Section of the ABA. Since further study and discussion would be fruitful, the Conference takes no position on these matters at the present time.

RESOLUTION NO. 9

Resolution No. 9, as elaborated upon by its implementing recommendation, calls for legislation authorizing agencies to provide by rule for abridged on-the-record procedures for use by unanimous consent of the parties. We do not believe that such legislation would accord the agencies any authority they do not already possess, and it might be construed to invalidate certain procedures at present employed in the absence of unanimous consent. Accordingly, we recommend against implementation of this proposal.

RESOLUTION NO. 10

Resolution No. 10 would grant all agencies authority to make subpoenas generally available in adjudicatory proceedings. Those agencies which conduct adjudications subject to 5 U.S.C. §§ 554, 556 and 557 or otherwise determined on the record after hearing should, as a general rule, possess subpoena power, and subpoenas should be available to the parties in such proceedings. We favor an amendment to the Administrative Procedure Act which would achieve this result with respect to adjudications subject to §§ 554, 556 and 557. It is not feasible or desirable, however, to make subpoenas available to either the agencies or the parties in every case of informal adjudication. Thus, amending the Administrative Procedure Act to provide a grant of subpoena power in appropriate cases of informal adjudication will require a definition of the category of proceedings to be covered; since framing a workable definition is exceedingly difficult, it may be found preferable for Congress to make such grants of subpoena power on a less general basis. In any event, we favor retention of that provision of the Administrative Procedure Act (5 U.S.C. § 555(d)) which permits the agencies to require by rule a statement or showing of general relevance and reasonable scope of the evidence sought before issuance of a subpoena.

RESOLUTION NO. 11

The Conference agrees in principle with the proposal that agencies be required to provide by rule the procedure applicable to cases of informal adjudication. We are convinced that in view of the vast range of informal agency adjudication, more empirical study is necessary before sound procedures of general applicability can be formulated.

RESOLUTION NO. 12

The Conference does not favor at this time amending the Administrative Procedure Act to treat agency issuance of prejudicial publicity. We believe that there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding. We agree with the American Bar Association that agency practices in the issuance of publicity adversely affecting persons in their businesses, property or reputations also present a problem, and we have proposed in our Recommendation 73–1 means of dealing with it.

SEPARATE STATEMENT OF MAX D. PAGLIN, EARL W. KINTNER, ANTHONY L. MONDELLO, WILLIAM A. NELSON, CHARLES F. BINGMAN AND JOHN H. POWELL, JR.

The above-named members of the Committee on Agency Organization and Personnel are of the opinion, for the reasons set forth in the Staff report accompanying the proposed Recommendation, that the Conference's position on Resolution No. 3 of the ABA Proposals (Separation of Functions) should be in the form and language originally submitted by the Council and various committees, to wit:

RESOLUTION NO. 3

Resolution No. 3 would extend the existing provisions regarding separation of functions in 5 U.S.C. § 554(d) to all formal proceedings, both adjudicatory and rulemaking; the existing exceptions for ratemaking, initial licensing, and formal rulemaking generally would be eliminated. With respect to rulemaking of particular applicability, all ratemaking, and initial licensing, the Conference approves this proposal insofar as it applies to agency staff actually engaged in investigative or prosecutorial functions, including the actual exercise of supervisory authority over such functions in a particular case. We do not believe, however, that agency officials having general organizational or supervisory responsibility for such functions should, solely by virtue of that responsibility, be barred from performing their customary function of advising agency members in proceedings not presently covered by 5 U.S.C. § 554(d). With respect to rulemaking of general applicability, the Conference believes there should be no statutory requirement of separation of functions.

SEPARATE STATEMENT OF MALCOLM S. MASON

I join in the above statement of Max D. Paglin and other named members of the Committee on Agency Organization and Personnel, except that I favor that portion of the Assembly's amendment to the original submission which would permit consultation with staff members whose exercise of supervisory authority occurs prior to commencement of the formal phase of the proceeding. More generally, I am of the view that various portions of the Conference's Statement concerning the ABA proposals overemphasize notions of formal neatness at the expense of realistic examination of the actual problems encountered in actual agencies in various kinds of proceedings.

STATEMENT OF THE ADMINISTRATIVE CONFERENCE ON ABA RESOLUTION NO. 1 PROPOSING TO AMEND THE DEFINITION OF "RULE" IN THE ADMINISTRATIVE PROCEDURE ACT

(Adopted December 19, 1973)

The Conference agrees with Resolution No. 1, calling for improved definitions of "rule" and "order" so as to distinguish more clearly between the nature of rulemaking and the nature of adjudication; it endorses the recommendation of the ABA that the words "or particular" and the entire second clause be deleted from the definition of "rule" in the Administrative Procedure Act. The Conference endorses this proposal upon the express understanding that—

(1) A matter may be considered to be of "general applicability" even though it is directly applicable to a class which consists of only one or a few persons if the class is open in the sense that in the future the number of members of the class may be increased. Thus, for example, smoke emission standards for a particular area are of general applicability even though at the time of their issuance they may, as a practical matter, be applicable to only one plant. On the other hand, a rate established for a single company on the basis of the capital requirements and credit rating of that company, and applicable only to that company, would be a matter of particular applicability and an order rather than a rule.

(2) A matter may be of "particular applicability" (and therefore an order) even though it is applicable to several persons, if the agency clearly specifies an intention to limit its applicability to the particular persons concerned.

(3) The deletion of the second clause does not imply a determination that the agency statements therein listed are not rules, but rather that they may be either rules or orders, depending upon their applicability and effect. If such statements become orders under the revised definition and are required by statute to be determined on the record after opportunity for agency hearing, the Conference believes that in the absence of a specific determination by Congress to the contrary they should be treated in the same manner as suggested for ratemaking in the next to last paragraph of this Recommendation, and that amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

(4) The proposed change in the definition of "rule" does not affect the precedential value of an agency's decision in a matter of particular applicability if the agency decides to proceed on a case-by-case basis rather than by rulemaking.

(5) This change is not intended to affect recommendations previously made which urge—

(a) The use of notice-and-comment procedures when considering issues of general applicability that may arise in the context of an adjudicatory proceeding (Recommendation 71–6);

(b) The use of trial-type or similar procedures when considering issues of specific fact in the context of a rulemaking proceeding (Recommendation 72–5); and

(c) Articulation and continual review of agency policies through rules, precedents and policy statements (Recommendation 71–3).

In endorsing the proposed redefinition, the Conference does not imply that a formal proceeding fixing the permissible rates of a specific enterprise—the agency activity principally affected—should be treated in all respects like other formal adjudication. To the contrary, we believe that ratemaking, like initial licensing, should receive special treatment with respect to the separation of functions requirements of 5 U.S.C. § 554(d), as set forth in the Conference Statement concerning ABA Resolution No. 3; that ratemaking should not be subject to the mandatory initial decision requirement of 5 U.S.C. § 557(b) and should continue to be governed by the provision of 5 U.S.C. § 556(d) authorizing agencies to require that evidence be submitted in writing. Amendments of the Act necessary to achieve these results should accompany the proposed redefinition of "rule."

The question of appropriate procedures for informal adjudication is a subject deserving further study. Meanwhile, we recommend that agencies continue, despite the reclassification, to give informal action of particular applicability and future effect at least the same procedural protections that are now in fact accorded.

The principal purpose of the suggested changes is definitional and prospective rather than operational and retrospective. That is, they are intended to provide a clearer definitional structure that will facilitate proper allocation of procedures with respect to legislation adopted in the future or new activities undertaken under existing law; they are not aimed at the correction of what are thought to be existing abuses. Accordingly, to the extent any agency believes that activities currently conducted as rulemaking would be adversely affected by the conversion which the ABA proposal would effect, it would not be inconsistent with the Conference's Statement to propose special procedural provisions therefor, so long as the integrity of the definition of "rule" (as here set forth) is not affected.

Following a study of these bills by our Legislative Committee and deliberation and vote by our Executive Committee, we propose the following changes:

(1) Amend the bills and the APA to change the title "hearing examiner" to "administrative law judge". This will accord with the official action taken by the Civil Service Commission in its 1972 title regulation, which was promulgated in public rulemaking proceedings after extensive study to determine the appropriate title for this position. It may be noted that this title change is recognized and effectuated in S. 5, which recently passed the Senate 94–0.

(2) *H.R. 10195 and H.R. 10196*

With the amendment proposed below, we prefer H.R. 10195 (the ABA bill) over H.R. 10196 (the ACUS bill) because the latter would weaken the application of the separation of function provisions in the case of investigation and prosecution supervisors in "ratemaking and cognate proceedings and in cases not subject to section 554(d)". With respect to agency employees (i.e., excluding the agency head or members), we believe no distinction should be made between formal rulemaking and adjudicatory proceedings in requiring separation of functions between investigation/prosecution and decisionmaking.

However, we believe such a distinction is warranted with respect to the agency heads and members of bodies comprising agencies. We therefore propose the following amendment to H.R. 10195:

> At p. 3, delete subsection (3) and substitute the following: "(3) In cases subject to section 554 of this title, but not in other cases, this subsection applies to the agency and to each member of the body comprising the agency".

(3) *Agency Review Processes—Sec. 1 of H.R. 10197 and Sec. 1 of H.R. 10198*

The right to an impartial and independent hearing can be effectively eroded by an agency's power to conduct *de novo* review of the judge's findings. In addition, standardless review of hearings decisions frequently results in great delay, uncertainty, cost to the taxpayer and the parties, and loss of efficiency and integrity in the administrative process. Such deficiencies are compounded when agencies delegate *de novo* review authority to agency employees (review boards, judicial officers, etc.) who are selected without judicial qualification standards and who serve without tenure rights to protect them against undue agency influence or control.

To prevent this erosion of rights and to promote the efficiency and basic fairness of the administrative review process, we recommend standards for internal agency review that will establish in proceedings subject to Sec. 554:

> (1) *Certiorari* review by the agency (or a review board), rather than review as a matter of right.
>
> (2) Limited grounds on which review may be petitioned, i.e.,
>
> (a) A finding or conclusion of material fact is not supported by substantial evidence.
>
> (b) A necessary legal conclusion is erroneous.
>
> (c) The decision is contrary to law or to the duly promulgated rules or decisions of the agency.
>
> (d) A substantial question of law, policy, or discretion is involved.
>
> (e) A prejudicial procedural error was committed.
>
> (3) Restriction of agency review *sua sponte* to matters of policy and law, with the requirement that the agency issue an order for review specifying the issue of law or policy to be examined (or re-examined) when it decides to review on its own motion.
>
> (4) Restriction of appointments to agency review boards, the position of judicial officer, or other agency review authority to APA members of the agency and administrative law judges.

As early as the reports of the Hoover Commission and Task Forces in 1949 and 1955, and through a continuous stream of reports and studies since then, researchers, leading experts, and legislators have recommended procedural reforms that would give greater finality to the decisions of administrative law judges, thereby to reduce the delays, uncertainty and waste in the existing internal agency review processes.

The Hoover Commission Task Force in 1955 recommended the following cornerstone for internal review standards:

"Upon review of an initial decision of a presiding officer in adjudication or rule making required under the Constitution or by statute to be made after hearing, except for questions of policy delegated to the agency by the Congress, the agency should have only the powers of review that a court has upon judicial review of agency decisions." [Hoover Commission, Task Force Report on Legal Services and Procedures, p. 203 (1955).]

In 1959 Senator Ervin introduced a bill to improve federal administrative procedures which rested upon a standard that, on review of a hearing decision, the agency shall not set aside findings of evidentiary fact unless they are shown to be "contrary to the weight of the evidence". (S. 1070, 86th Cong., 1st Sess. (1959).)

This major bill having failed to pass, in 1961 the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee commenced a renewed attack on the problems of delay and uncertainty in agency reviews under the APA and, following hearings, reported, *inter alia:*

". . . The subcommittee believes that the readiest instrument available for a concerted effort to eliminate backlogs and delays in the administrative process is the utilization of the existing hearing examiner corps by increased delegation of authority, increased finality of their decisions, and increased authority to control the course of hearings.

". . . To the extent that other statutes interfere with such delegations of authority, the subcommittee recommends legislation which will not only permit, but require, the full utilization of the potential of the hearing examiner corps. [S. Rep. No. 168, Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 87th Cong., 1st Sess. pp. 7–8 (1961).]

These proposals and further extensive study of the problems resulted in the Subcommittee's proposals of major amendments to the APA in 1965. The bill, introduced by the late Senator Dirksen, provided a "clearly erroneous" standard for agency review of "findings or conclusions of material fact" and standards for the selection and independence of agency appeals boards (limiting selection to agency heads, members of the body comprising the agency and administrative law judges), and provided for certiorari review by the agencies. It also provided that if an agency decided to review on its own motion, it must enter an order for review specifying the "agency policy or novel question involved". (S. 1336, 89th Cong., 1st Sess., introduced March 4, 1965 and passed by the Senate on June 21, 1966).

In 1971 the Ash Council reported continued deterioration through problems of delay, inefficiency, waste and uncertainty in the administrative process, finding that the agencies' strong tendency toward "systematic review of decisions," frequently characterized by "*de novo* review of findings," has "unduly prolonged proceedings and nurtured high case backlogs leading to ineffective uses of agency resources" and unjust burdens upon the parties and the taxpayers. (*The President's Advisory Council on Executive Organization, A new Regulatory Framework, Report on Selected Independent Regulatory Agencies*, pp. 21–22, 49 (1971).) As recommended by the Ash Council, if the serious deficiencies of agency review processes are to be overcome, it will be necessary to place a greater share of the responsibility for individual case determinations on the administrative law judges, "leaving the administrator relatively free to concentrate on more appropriate means of formulating broad policy." The Council therefore proposed to replace "systematic review of initial decisions" with discretionary reviews "primarily for consistency with agency policy."

These problems persist today, as we believe this Subcommittee's hearings will reveal. As recognized by the FCC, for example, in reviewing the recent Task Force Report on its internal review processes:

"At present the Commission and Review Board engage in *de novo* review of Initial Decisions. The time from Initial Decision to Board decision averaged 350 days in 1973, and from Initial Decision to Commission decision averaged 382 days in that year. * * *

"Currently, parties seeking review of a final decision may file a 25-page application for review which can address virtually any alleged error by the Board. As a result of this *de novo* review of the Board's *de novo* review of an Initial

Decision, the time span from Board decision to Commission action on the application for review averaged 248 days in 1973." [Notice of Proposed Rulemaking, FCC 75-1250 38922, adopted November 11, 1975, pp. 14 and 16.]

Our own studies reflect that such problems are widespread. It is evident that what is needed to reduce or eliminate existing delays, duplicated efforts, waste and uncertainty in the agency review processes is a requirement that internal agency review be discretionary and subject to review standards to prevent *de novo* review of evidentiary findings. Without these changes, we submit, the ills of the existing system cannot be cured.

Sec. 1 of H.R. 10197 and Sec. 1 of H.R. 10198 do not meet the obvious needs for necessary improvements. On the contrary, Sec. 1 of H.R. 10197 (lines 6-9, p. 2) retains the *de novo* review authority of existing section 8(a) of the APA; and Sec. 1 of H.R. 10198 authorizes "agency appeals boards" without requiring discretionary review, and without preventing *de novo* review by such boards, allowing the buildup of another layer of delay, confusion and uncertainty in the agency review process. In addition, Sec. 1 of H.R. 10198 fails to employ a realistic standard to ensure judicial qualifications and impartiality of agency review board members.

We agree that agency review board members must be well-qualified to review hearings decisions, and should be immune from agency pressures in exercising their impartial, independent judgment. However, it is unfair, and unrealistic, to expect an agency to grant a life-time appointment to an agency review board member, since one of the basic purposes of such boards is to ensure consistency of the administrative law judges' decisions with agency rules, decisions, and enunciated policy.

On the other hand, we disagree with the view of Mr. Wm. Warfield Ross that agency review board members "should be alter egos of the agency itself, and subject to its immediate direction and control" (his ltr. of November 18, 1975, to you, p. 2)—that is, the view that board members should not be protected against agency influence or control. We also disagree with Mr. Ross' conception of review boards as an instrument for putting on the record a review function now carried out by an anonymous staff. On the contrary, we believe the problems of delay are too much review—on and off the record—and too much review without standards of any description.

Instead, we believe the fundamental purpose of agency review boards—if they are to increase the effectiveness and basic fairness of the administrative process—is to provide an efficient and speedy process for correcting errors in hearings decisions that do not warrant or justify the personal attention of agency heads and members of a body comprising an agency. As the Ash Council recommended, agency heads and members must be free to concentrate on major issues and to formulate broad policies to effectuate that statutes they administer. Efficiency and fairness to the parties will obviously not be realized if agency review boards are created to carry out *de novo*, standardless review by employees dependent upon agency supervisors.

We believe a most desirable solution is found in the Dirksen bill, passed by the Senate in 1966, which would limit appointments to agency review boards to agency members and administrative law judges. Under this approach, administrative law judges would be available to sit on agency boards somewhat analogously to the invitation of district judges to sit on a court of appeals. In this way, the agency and the administrative law judge would have mutual discretion to agree to the appointment, while the judge would be in no way hindered in the exercise of impartial, independent judgment on the issues. We also favor the approach of that bill to set a standard for agency review of evidentiary findings and to require the agency to limit review *sua sponte* to important issues of policy and law.

We therefore propose amendments to Sec. 1 of H.R. 10197 and Sec. 1 of H.R. 10198 that will eliminate *de novo* review of findings of fact in adjudication hearings decisions, that will require a certiorari review system for internal agency review, and that will restrict appointments to agency review boards to agency members and administrative law judges.

These proposals are as follows:

Sec. 1 of H.R. 10197

(a) Redesignate subsection "(b)" as "(b)(1)" and insert the following opening sentence:

> "(b)(1) This subsection does not apply to cases subject to section 554 of this title, but applies to all other proceedings subject to section 556 of this title."

At line 4, p. 2, change "appeal" to "review".
At line 5, p. 2, change "557(d)" to "557(d)(2)".
At line 10, p. 2, change "appeal" to "review".

(b) Add the following new subsection after line 23 at p. 2:

"(b)(2) This subsection applies to cases subject to section 554 of this title.

"(A) An administrative law judge assigned to conduct a proceeding subject to section 554 of this title shall hear, and make a determination upon, such adjudicatory proceeding, and any motion in connection therewith, and shall make a decision that constitutes his final disposition of the proceeding. The decision of the administrative law judge shall become the final decision of the agency thirty days after its issuance (or other period if specified by staute) unless within such period the agency has directed that such decision shall be reviewed by the agency in accordance with paragraph (C) of this subsection. An administrative law judge shall not be assigned to prepare a recommended decision in any proceeding subject to section 554 of this title.

"(B) The provisions of any other statute notwithstanding, an agency may delegate to administrative law judges appointed under section 3105 of this title the final authority of the agency to adjudicate any proceeding subject to section 554 of this title.

"(C) Each agency that conducts proceedings subject to section 554 of this title shall prescribe rules of procedure for any agency review of the decisions of administrative law judges in such proceedings which shall meet the following standards:

"(i) *Petitions for discretionary review.* (a) any party may file and serve a petition for discretionary review by the agency of a decision of an administrative law judge within thirty days after the issuance of such decision (or other period if specified by statute). Review by the agency shall not be a matter of right but shall be within the discretion of the agency.

"(b) Petitions for discretionary review shall be filed only upon one or more of the following grounds:

"(*1*) A finding or conclusion of material fact is not supported by substantial evidence.

"(*2*) A necessary legal conclusion is erroneous.

"(*3*) The decision is contrary to law or to the duly promulgated and published rules or decisions of the agency.

"(*4*) A substantial question of law, policy, or discretion is involved.

"(*5*) A prejudicial procedural error was committed.

"(c) Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignments of error are based on the record, and by statutes, regulations or other principal authorities relied upon. Except for good cause shown, no assignment of error by any party shall rely on a question of fact or law upon which the administrative law judge had not been afforded an opportunity to pass. Review, if granted by the agency, shall be limited to the questions raised by the petition.

"(ii) *Review by agency on its own motion.* Except where a statute or regulation precludes the agency from reviewing on its own motion, an agency may in its discretion, at any time within thirty days after the issuance of a decision of an administrative law judge (or other period if specified by statute), order the case before it for review on its own motion, but only upon the ground that the decision may be contrary to law or agency policy, or that an important question requiring examination of agency policy has been presented. The agency shall state in such order the specific issue of law or agency policy to be reviewed. If a party's petition for discretionary review has been granted, the agency shall not raise or consider additional issues in such review proceedings except by separate order for review in compliance with this paragraph.

"(iii) *Agency review authority.* The review proceedings subject to paragraph (i) or (ii) of this subsection, the administrative law judge's findings and conclusions of facts, as distinguished from discretionary rulings and the application of agency policy, shall not be set aside by the agency unless such findings or conclusions of fact are not supported by substantial evidence on the record considered as a whole.

The agency may affirm, set aside, or modify the decision or order of the administrative law judge in conformity with the record, or may remand the case to the administrative law judge for such further proceedings as the agency may direct. If the agency determines that further evidence is necessary on any issue, it shall remand the case for further proceedings before the administrative law judge. If the agency consists of a body of members, it shall grant review under paragraph (i) or order review on its own motion under paragraph (ii) of this subsection only by the casting of the number of votes otherwise required for normal agency action.

"(iv) In proceedings subject to section 554 of this title, the review standards required by this subsection shall also apply to review of an administrative law judge's decision by a review board established pursuant to section 557(d)(2) of this title and shall be construed to apply to such review board to the same extent that such standards apply to the agency within the meaning of paragraphs (i), (ii), and (iii) of this subsection."

Sec. 1 of H.R. 10198:

(a) Delete amended subsection (d), at pp. 1–2, and substitute the following subsections:

"(d)(1) The provisions of any other statute notwithstanding, agencies shall not delegate to or establish a review board, judicial officer position or other authority to review the decisions or ruling of administrative law judges in proceedings subject to section 554 of this title unless appointments to such board, position or other authority are made solely from one or more of the following persons or a combination of such persons:

(A) the head of the agency;

(B) members of the body which comprises the agency; or

(C) administration law judges appointed under section 3105 of this title.

Review by such boards, officers, or other authority delegated by the agency shall be governed by the standards prescribed in section 557(b)(2) of this title. Appointment of an administrative law judge to a review position under this paragraph or paragraph (2) of this subsection, and his continued service in such position, shall be with the consent of the administrative law judge and at no increase in the salary he would otherwise receive as an administrative law judge. An administrative law judge so appointed may transfer voluntarily, or be transferred involuntarily (at the pleasure of the agency), from such review position; *provided:* upon his transfer from such review position, whether at his discretion or at the discretion of the agency, he shall be entitled to automaitc reinstatement as administrative law judge with the agency, with the same classification, pay, status, and office location therein that he would have had had he not entered such agency review position.

"(2) The provisions of any other statute notwithstanding, whenever an agency deems it appropriate for the efficient and orderly conduct of its business, it may, by published rule or order, establish one or more review boards to review decisions or rulings of presiding officers in proceedings subject to section 556 of this title; *provided:* that agency appointments to boards that review decisions of administrative law judges in proceedings subject to section 554 of this title shall be made solely from the persons specified in paragraph (1) of this subsection, and in accordance with the requirements of said paragraph. Review by such boards of the decisions of administrative law judges in proceedings subject to section 554 of this title shall be governed by the standards required in section 557(b)(2) of this title. In the performance of their review functions the members of an agency review board shall not be responsible to or subject to the supervision or direction of any official employee or agent engaged in the performance of investigative or prosecuting functions for any agency. Each agency shall specify by published rules the circumstances and conditions under which the agency will (1) entertain petitions for review filed with the agency directly from the decision of a presiding officer and (2) entertain a petition for review of the decision of a review board. An agency may provide by rule that agency review board decisions become final unless reviewed by the agency in its discretion; *provided:* that in proceedings subject to section 554 of this title agency review of a review board's decision shall not be a matter of right but shall be discretionary with the agency and shall be governed by published agency standards that conform to the standards of discretionary and limited internal agency review provided in section 557(b)(2) of this title.

(b) Add the following new section to *H.R. 10198:*

"Sec. 3. Section 557(c) of this title is amended by adding the following sentence immediately before the sentence, "The record shall show the ruling on each finding, conclusion, or exception presented.":

"Provided: Before the decision of the presiding officer after an evidentiary hearing subject to section 554 of this title, the parties may be limited to oral presentation of their proposed findings and conclusions and supporting reasons at the close of the evidentiary hearing, if in the sound discretion of the presiding officer the nature of the evidence and the issues does not reasonably require longer preparation or written submissions."

(4) *Sec. 2 of H.R. 10197*

Sec. 2 of H.R. 10197 would add a new subsection (d) to section 575 of title 5, to empower the Administrative Conference of the United States to formulate and promulgate uniform rules, and amendments thereto, which would be binding on all agencies in the conduct of adjudicatory proceedings under section 554.

The Administrative Conference was created for the purpose of studying, and making recommendations to the President, Congress, the Judicial Conference of the United States, and to administrative agencies concerning procedures and practices used in the conduct of administrative programs, for the purposes of achieving and improving efficiency, adequacy, and fairness in administrative proceedings.

As it is constituted, it is an advisory body only. The proposed section (d), if enacted, would broadly expand the purpose of the Conference and in a manner not contemplated by the basic legislation creating it. In effect, the proposed section (d) would allow ACUS to overreach all agencies in the matter of establishing procedures, which is an authority presently vested in each of the administrative agencies and in Congress. It would appear that such broad authority should not be vested in ACUS in the absence of a comprehensive study, on an agency by agency basis, to determine its probable effect on individual agency programs and policies.

While we share the goal of uniformity in administrative procedures wherever feasible and desirable, it is considered that ACUS functions would more properly be discharged in this field by recommendations to the agencies, or to the Congress, after thorough study of individual proposals.

It is considered highly desirable that promulgation of any uniform rules be done by the Congress, rather than by delegation to an advisory body such as ACUS. The recent Federal Rules of Civil Procedure made effective for all civil proceedings in the federal court system were instituted only after thorough study by the Congress. We suggest that the adjudicatory proceedings conducted by the several administrative agencies are of such importance and significance to the public as to deserve the attention and oversight of the Congress for the same reasons.

We therefore agree with ACUS in its opposition to Sec. 2 of H.R. 10197 (see ACUS Comments on ABA Resolution No. 5, 1 CFR § 310.2 (1973)).

(5) *Sec. 5 of H.R. 10197*

This section would add a new section (§ 560) to title 5, regulating and prohibiting "Prejudicial Publicity" by agencies' statements or documents concerning an investigation or proceeding if the statement or document released by the agency evidence prejudicial bias or prejudgment concerning facts in issue or "may otherwise harm any person in his business, property, or reputation, unless the benefit to the public clearly exceeds the potential harm to the person adversely affected". It requires 72 hours advance notice to the person affected by an agency release of such a statement or document, and provides for court action against the agency either to enjoin such a release or to nullify agency actions and proceedings if the agency has violated the prohibition against prejudicial publicity.

This bill is proposed by the ABA and originates from its Resolution No. 12.

The Administrative Conference of the United States in a Statement Adopted June 7–8, 1973, on the ABA proposals to amend the Administrative Procedure Act has taken a position in opposition to Resolution No. 12. The ACUS statement on prejudicial publicity provides:

"The Conference does not favor at this time amending the Administrative Procedure Act to treat agency issuance of prejudicial publicity. We believe that

there exists at present an adequate legal remedy for agency publicity which affects the integrity of an on-the-record agency proceeding. We agree with the American Bar Association that agency practices in the issuance of publicity adversely affecting persons in their businesses, property or reputations also present a problem, and we have proposed in our Recommendation 73–1 means of dealing with it."

ACUS Recommendation 73–1, 1 CFR 305.73–1, recommends that the problem of adverse publicity stemming from federal regulatory activity be handled by regulations to be issued by the agencies. We endorse this approach to the problem because it avoids the serious problems posed by the ABA proposal.

Some of these problems are summarized below:

1. By authorizing a prior restraint on the issuance or publication of adverse agency publicity that is factual in content and accurate in description the proposal in a retreat from hard-won gains in protecting the public's right to know.

The general policy favoring disclosure of administrative proceedings is embodied in the Freedom of Information Act, in the Sunshine Bill, S. 5, and has been adopted and endorsed by the Supreme Court. See, *FCC* v. *Schrieber*, 381 U.S. 279, 293 (1965). Furthermore, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), and its hardy progeny have firmly established that any legislative proposal to inhibit robust, wide-open debate and discussion of persons or corporations involved in public issues and matters of wide public interest is at war with the First Amendment. Compare, *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). And this is especially so where the legislature attempts to establish prior restraints on the publication of information that the public has a right to know. See, *New York Times* v. *United States*, 403 U.S. 713 (1971); Rosen*bloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971).

2. The courts have viewed with a jaundiced eye any law that inhibits a regulatory agency or any public official from publicizing and alerting the public to suspected violations of the law by factual press releases, concluding that such laws are contrary to the public's right to be informed and as having a chilling effect on vigorous law enforcement. See, *e.g. Barr* v. *Matteo*, 360 U.S. 564; *City of Chicago* v. *Tribune Co.*, 307 Ill., at 610; *Gregoire* v. *Biddle*, 177 F. 2d 579, 581. The leading case of recent vintage, of course, is *FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308 (D.C. Cir. 1968). There in upholding the right of the FTC to issue a factual news release concerning a complaint issued in a pending adjudicatory proceeding the court noted:

"We have no doubt that a press release of the kind herein involved results in a substantial tarnishing of the name, reputation, and status of the named respondent throughout the related business community as well as in the minds of some portion of the general public. * * *

"[Nevertheless] if the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him utilizing such prohibited conduct. Certainly advice through news media as to the actions being taken by a government agency in his behalf constitutes a prophylactic step addressed ultimately to the elimination of the conduct prohibited by the statute. [404 F. 2d. at 1313–1314.]"

In a concurring opinion, Judge Robinson found that not only does the regulatory news release serve as a warning to that segment of the public that may be affected by the conduct charged but also serves as a vehicle for disseminating to the public at large newsworthy information already in the public domain. This difference in the emphasis on the purpose of such releases he found "fundamental in terms of the nature of the problem with which we are confronted."

The effective functioning of a free government like ours depends largely on the force of an informed public opinion. (Citation omitted) Relatively few matters attract more readily the interest of the people than what government is doing for the people. News releasing by the agencies of government has become a standard technique in the operations by which the people are kept knowledgeable as to governmental affairs. Press releases by public officials, we have said, "serve a useful if not essential role in the functioning of the democratic processes of government." (Citation omitted)

An incidental and wholesome consequence of general publicity of proceedings challenging the fairness and honesty of particular commercial practices may well be the generation of a desirable if unnecessary measure of public caution in dealings with those identified with such practices. Publicity, or the specter of

publicity, may also, in a very practical way, achieve on its own a degree of informal regulation by deterring those who otherwise might be tempted to take liberties with the law. (Citation omitted) But beyond these factors is the consideration that the business of an important governmental agency is everybody's business. The people want to know, and are entitled to know, what goes on in government (Citation omitted), and the thirst for information is not limited to those who may have or may contemplate a direct commercial relationship with the subject of governmental concern at the moment. The activities of the Federal Trade Commission constitute news, and any restriction upon its machinery for public accessibility to that news must be taken for what it really is. [404 F. 2d. at 1317–1318.]

For these reasons, the court rejected as unsound the contention that issuance of the press release prior to final adjudication constituted or gave the appearance of constituting, a prejudgment of the issues. As the court concluded:

"We are confronted, then, not with the question of whether the appellees have suffered actual damage but whether the action of the Commission is so authorized or permitted in law as to place the appellees in the position of suffering *damnum absque injuria.*"

In answer to this question the court found the practice of issuing factually accurate press releases concerning the institution of adjudicatory proceedings was not violative of respondent's right to due process and did not violate the Commission's duty to avoid prejudgment of the issues.

Thus, the court found the Commission and inferentially all regulatory agencies are fully authorized to make available to news media, the public interest, factually accurate summaries of significant developments in adjudicative and other proceedings instituted against members of the business community. Compare, *FCC* v. *Schrieber, supra; E. Griffiths Hughes, Inc.* v. *FTC*, 63 F. 2d 362 (D.C. Cir. 1933); *American Sumatra Tobacco Corp.* v. *SEC*, 299 F. 2d. 127 (D.C. Cir. 1962); *Bowman* v. *United States Dept. of Agriculture*, 362 F. 2d. 81 (5th Cir. 1966).

3. The standards for determining when information may or may not be issued under this bill are so vague as to defy specification and can only result in the imposition of a legislative "gag" rule on the dissemination of news from the regulatory agencies. The proposal permits the release of information or publicity with respect to a respondent's conduct only if the "benefit to the public clearly exceeds the potential harm to the person adversely affected." This highly speculative standard is apparently intended to require that the regulatory agencies weigh the benefit to the public against the harm to respondent, subject to judicial review and the sanction of dismissal of the proceeding if the agency guesses wrong or the courts disagree with the agency's exercise of discretion. Moreover, under the Mandamus and Venue Act of 1962, the agencies must guess which of the many District Courts the respondent may choose to make its challenge and the unknown attitudes of those courts. Certainly, if the exercise of agency discretion is to be subject to such drastic judicial remedies the bill should clearly articulate the preconditions for exercise and play of agency discretion or standards similar to those espoused by Judge Robinson should be codified. See, 404 F. 2d. 1320–1321.

4. Subsection (b) imposes limitations on its exceptions that are wholly impractical from the standpoint of administration. While in many instances a notice of 72 hours may involve no prejudice to the public interest there clearly are many others in which the health, safety, or economic well being of the public will be adversely affected by such a delay. To require that waiver of this requirement must be justified in a lawsuit brought to establish whether issuance of a press release or even an oral statement was required by the exigencies of the situation or was otherwise impractical is only to invite further delay and complexity in the disposition of administrative proceedngs.

We appreciate the opportunity to present these views to you. The Federal Administrative Law Judges Conference applauds the diligence and concern of this Subcommittee in setting these hearings. We shall endeavor to assist the work of the Subcommittee in any way that we can.

Judge FAUVER. I just wanted to comment on three aspects of this, and the other matters are covered in my statement.

Mr. Chairman and members of the committee, as early as the reports of the Hoover Commission in 1948 and 1955 and through a

continuous stream of reports and studies since then, researchers, leading experts, and legislators have recommended an increase in the finality of the decisions of administrative law judges applying predictable review standards that the parties can rely on in forecasting where that case is going. In 1955 the Hoover Commission task force proposed a specific standard of internal agency review. In 1959, Senator Ervin proposed that agencies be bound by a standard not to set aside the findings of the administrative law judges, then known as hearing examiners, unless they are shown to be contrary to the weight of the evidence.

This bill having failed to pass, in 1961 the Senate Subcommittee on Administrative Practice of the Judiciary Committee in the Senate proposed a renewed attack on the problems of delay and uncertainty in agency review. And after hearings it reported—and I will just summarize some of those quotes—that:

> The Subcommittee believes that the readiest instrument available for a concerted effort to eliminate backlogs and delays in the administrative practice is the utilization of the existing hearing examiner corps by increased delegation of authority, increased finality of their decisions, increased authority to control the course of hearings. To the extent that other statutes interfere with such delegation of authority, the Subcommittee recommends legislation which will not only permit but require the full utilization of the convention of hearing examiners.

Following these studies, gentlemen, Senator Dirksen picked up the banner and he presented to the Senate a bill which resembles very much the very proposal that we are now making today to you. I would like to refer you to the opening statement that the late Senator Dirksen made in introducing the forerunner to S. 1336 which passed the Senate. He said:

> As the workload of the larger agencies steadily increases in volume, the time required for agency members to review and sometimes rewrite the findings of fact and application—

Excuse me, this was a quote from Mr. Kennedy, which I was going to include in the statement, but I will move to Senator Dirksen's quote in which he said:

> The bill changes the manner in which decisions are made and reviewed. Several years ago a critic of the administrative process said that decisions were made "on the dark side of the moon." That is the place, they say, that a little group of men meet and rewrite the decision of the officer who presided at the hearing. This little group of men have not heard the evidence or seen the witnesses. They have not heard the argument but they have the ear of the members of the agency and the power to pick and choose from the record which has been prepared as they rewrite the decision of the presiding officer. It is said that they sometimes torture that record to get the result they want. That is a dark picture indeed if the allegations are true. But we do not have to decide whether the allegations are true or whether they are false. It is enough if they could be true. I suggest that we bring this dark side of the administrative procedures into the public view just as we are trying, in our space efforts, to bring the dark side of the moon into public view.

And then he stated:

> Under this proposal the decision of the presiding officer would not be subject to being rewritten by our little group of men on the dark side of the moon. Instead, it would only be subject to review on the issues presented in written exceptions which spelled out how some error was committed by the presiding officer in making his decision or in some specific question which should be reviewed. Everyone will then know what is being reviewed and why.

Then he proposed, and the bill passed the Senate, a bill that provided a clearly erroneous standard for the review of the findings of the administrative law judges; a bill that provided, yes, that there should be authority appeals boards, that those numbers should be limited to the agency members or administrative law judges; a bill that provided for a certiorari review; and a bill that provided that if the agency wished to review sua sponte, it confined itself to major issues of law and policy.

Now most regrettably for the Nation, Congressman Walter, who was going to manage that bill in the House of Representatives, died. And when he died, the agencies who were opposed to Senator Dirksen's bill and the bill that was picked up by the Senate Judiciary Committee, as I understand history or the record, they went to President Johnson and urged him to propose an Administrative Conference Act. And that act was given to Congress saying if Senator Dirksen's ideas are valid, why don't we form a permanent Administrative Conference and let them study it and report back to us.

That action was passed and the Administrative Conference of the United States was then permanentized in 1968, but, gentlemen, ever since then everything has been advisory. And I submit to you that the merits of Senator Ervin's ideas, of former President Hoover and his Commission, and of Senator Dirksen, that these ideas have never fully been tested and found to be wanting in merit. We believe they were sound ideas and it was kind of a regretful happenstance in history they were sidetracked. We ask you to reconsider then again.

I would mention to you that in the Senate with 40 cosponsors, Senator Harrison Williams of New Jersey has introduced, along with Senator Kennedy, on a bipartisan basis with also members of the other parties, S. 1302, which carries the same banner and standards that Senator Dirksen was talking about. And these would be apprised, if that bill passes, to integrate all safety and health. This would affect over 75 million workers and would affect over 10,000 mines and would affect over 4 million work places in this country all applying Federal safety and health standards and subject, gentlemen, to the same substantial evidence rule, the certiorari review standards that we recommend.

So that I would say that I have seen criticisms of internal review standards. I think that they are superficial. I commend to you the contributions, experience, and quality of the minds through recent history who have recommended review standards.

I would like to say also on the review standards, Mr. Chairman, but I think that there is a misconception about the review standards similar to Senator Dirksen's and those that we propose in that the review standards we proposed unlike judicial review of an agency's decisions, in that we do not propose that the findings of administrative law judges be conclusive on the agency at all. As you know, that is the standards the courts have basically, that is, if they are supported by substantial evidence, they are conclusive. We propose instead the agencies be directed not to set aside findings if they are supported by substantial evidence. This means that if the agency feels that the judge has made a mistake, it can remand the case to him for further evidence and further development of those issues.

The agency is never bound by his findings. But the advantage we see to the substantial evidence rule is that it will drastically reduce the flow of the agency review and rehashing of evidence.

My points on the other two are really covered in my prepared statement.

Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you very much, gentlemen. Since counsel has prepared a point-by-point analysis, I suggest that we do a point-by-point rundown of the various provisions within the legislation. It does not necessarily follow the bills, so I think all of you can speak to the thing as we go down the line. I am going to attempt to begin this on the less controversial matters we have before us and then move into the more difficult ones in order to elicit from you your various comments. Keep in mind, if you will, the constraint of time that we do have. When the bell rings for a vote, we are going to have to adjourn until another time.

I gather from what you have all said that as to H.R. 10194, as to both the section 1 and section 2, there is very little, if any, controversy. Is that the case?

Judge FAUVER. That is correct.

Mr. FLOWERS. We have specific questions on these matters. As to section 1, will this adversely affect existing procedures of any agencies? Second, why is the change necessary? And why was rulemaking defined so broadly in the Administrative Procedure Act originally? Mr. Ross, would you like to answer?

Mr. Ross. Very briefly, Mr. Chairman. The main effect it will make in the short term is that it will impose separation of functions requirements on agencies which presently engage in formal rulemaking, which will become adjudication under this bill. For the future it will clarify and eliminate an anomaly in the act that can provide trouble sometime in future legislation; that is, the original act classified, in a kind of a pig-wigglian way, "ratemaking" as "rulemaking in particular applicability", which is principally ratemaking and cognate proceedings involving the rates of a single company, well, that was classified as "rulemaking".

Well in the Anglo-American law, Mr. Chairman, that is like an anomaly. It is nonsense because such matters are essentially adjudicatory in nature.

So we will eliminate that anomaly. Now why it was done in the first instance I think there is a fair amount of history about that.

I think some of the agencies, which have been using quasi-rulemaking procedures in setting rates, were very reluctant to have that rate-setting mechanism treated as an adjudication and they had the votes in Congress. So this modification was made in the Administrative Procedure Act bill, as I understand it, fairly far along in the process. Now I may be wrong about that. We are now correcting something that I think is an anomaly and it is going to give problems in the future. This is I think an appropriate time to do so.

Mr. FLOWERS. Would Mr. Berg have any comment on that?

Mr. BERG. Mr. Chairman, I would raise some question as to the effect on separation of functions. To some extent that depends on what happens to other parts of this package because one of the thrusts of H.R.

10195 and H.R. 10196 is to deal with both formal rulemaking and formal adjudication more or less the same with respect to separation of functions. So that if either one of these were enacted, the problem of the definition of "rule" or "order" would become less significant. But the reason that the Conference does favor this redefinition is that in terms of usage, in terms of the ordinary understanding of "rulemaking" and "adjudication," we feel the present definition in the APA, which is based on the difference between future and retrospective effect, is not realistic and that the difference ought to be, as Bill Ross maintains, between matters of general and of particular applicability. Therefore, we favor redefinition which would make the test of adjudication one of particular applicability rather than of retrospective effect.

Mr. FLOWERS. I'm glad you all agree on that section. I don't know what sort of debate we would have had if it was a matter of disagreement.

Tom, do you have anything on this particular section? I hate to say it, but we are not going to get very far today. I'm afraid we may have bitten off a lot more than we can chew on this day's hearing, but we will just go as far as we can. Let's try to be as precise as we can or we won't even get into the first issue.

Mr. KINDNESS. I would just like to raise a question and ask for any comments our witnesses have with respect to the military exemption that would be changed by H.R. 10194. To your knowledge, do either the Defense Department or the State Department have any problems with the modification of the military and foreign affairs exemption?

Mr. Ross. I believe that to be addressed by Mr. Berg. I heard of none but he would be in a better position to know.

Mr. BERG. My recollection is that when the conference adopted the recommendations on this subject, there was no dissent from Defense and State but I have not seen any comments addressed to this legislation either in the Senate or in the House. My understanding is that they are willing to go along with it.

Mr. KINDNESS. Is anyone in the position to illustrate circumstances under which the exemption is currently utilized or the frequency with which it is utilized? Could that be commented upon?

Mr. Ross. My understanding is that it is very extensively used. In other words, that—and I'm now speaking from memory as something I got into about 2 years ago—but that they simply in general terms in these areas, Mr. Kindness, do not now follow notice and comments rulemaking; that they simply enact regulations without general public participation.

Mr. KINDNESS. Is there any abuse that could be cited, or any wrong that should be corrected, as a reason for the proposed change?

Mr. Ross. I'm not prepared at this point in time to give you an example, Congressman Kindness. But I think that I would rely upon the principle that there is no governmental need for excluding public participation in important matters affecting the public and I think the public should be allowed some participation.

Mr. KINDNESS. Obviously there is no information available with respect to what cost might be incurred with respect to the result of this change then?

Mr. Ross. It would seem to me, if there were significant cost involved, you would have those agencies objecting. Their silence is I think probative on that matter.

Mr. KINDNESS. On that point we might differ. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you, Mr. Kindness. I think that adequately covers H.R. 10194 as far as I'm concerned unless staff on either side can think of any matters that ought to be interjected here?

Mr. MINGE. Yes, I would like to bring up one point. In August 1974 Congress passed the Office of Federal Procurement Policy Act which requires public participation in promulgation of procurement rules. During its consideration of how best to achieve public participation, Congress rejected proposals for amending the Administrative Procedure Act to delete the exception in section 553(a)(2) for contracts. In light of this development, I wonder if some change in section 2 of 10194 is not appropriate.

Mr. Ross. Professor Minge, what I would like to do—and I'm personally not familiar with that for it did not come to my attention—I would like to, if permitted to submit a brief statement on your point to the committee for incorporation into the record.

Mr. FLOWERS. Fine, and it is so ordered.

[The letter subsequently received by the subcommittee is as follows:]

AMERICAN BAR ASSOCIATION,
Washington, D.C., January 29, 1976.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CHAIRMAN FLOWERS: At last month's hearing on the American Bar Association and Administrative Conference proposals to revise the Administrative Procedure Act, your staff expressed concern about possible inconsistency between one of our proposals and PL 93-400. Our proposal (Section 2 of H.R. 10194) would require agencies to use notice and comment procedures when they adopt rules relating to procurement contracts, while PL 93-400 created the Office of Federal Procurement Policy and charged it with drawing up rules on that subject.

The ABA strongly supports the principle that the public should be given an opportunity to comment on proposed agency rules whenever possible. However, to avoid possible difficulty, the ABA would not object to an amendment to the notice requirement that would exempt procurement rules adopted by an agency in compliance with criteria and procedures established by the Office for effective and timely consideration of the viewpoints of interested parties. The ABA suggests that this exemption not apply to the Office itself, so its own rules would come under the APA's notice and comment procedures. The ABA also urges the Subcommittee to include language in the legislative history stating that the Congress believes public notice of prospective rulemaking and an opportunity for the public to comment are desirable and important elements of an open governmental process.

Sincerely yours,

WM. WARFIELD ROSS.

Mr. FLOWERS. Mr. Berg, do you have a comment on that?

Mr. BERG. No, I would like to reserve the opportunity to comment in writing on that too. I recall that at the time that that bill was pending we submitted comments in which we suggested implementation of our recommendation on the amendment to 553 could properly take place in the context of that bill but the suggestion was not adopted.

Mr. FLOWERS. That will be placed in the record, too.

[The written comment is as follows:]

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., February 3, 1976.

Hon. WALTER FLOWERS,
Chairman, Subcommittee on Administrative Law and Governmental Relations, House Judiciary Committee, Washington, D.C.

DEAR CHAIRMAN FLOWERS: At the recent hearing on H.R. 10194—H.R. 10199, bills relating to improved administrative procedure, I undertook to amplify in writing my response to questions raised by members of the Committee.

First Congressman Kindness asked for illustrations of the use of the exemption in section 553(a)(1) of the Administrative Procedure Act for rulemaking involving a "military or foreign affairs function of the United States." According to a survey conducted by the Conference in 1969 at least eight agencies and departments, including not only the Departments of Defense and State, but also the Departments of Agriculture, Commerce, and the Treasury, engage in some rulemaking asserted to be covered by the exemption, although the exemption is not always invoked. Among the rules which are or might be covered by the exemption are Defense Department procurement regulations (also exempt under section 553(a)(2)), rules of the Passport Office and the Visa Office of the State Department, Treasury Department rules relating to foreign assets control, to delivery of checks and warrants outside the United States, and to the international traffic in arms, and the regulations of a number of agencies relating to the export or import of goods. See Bonfield, Military and Foreign Affairs Function Rule-Making under the APA, 71 Mich. L.R. 221, 232–33, 239, 261–65(1972) (copy enclosed). We do not have current information as to the frequency with which the exemption is asserted in practice. In answers to our 1969 survey several agencies and subunits of agencies indicated that where the exemption is available it is invoked automatically, Bonfield, *supra* at 233–34, but agencies responding to our Recommendation 73–5 expressed willingness to consider notice-and-comment procedures on a voluntary basis, and some have taken formal steps in that direction. See *e.g.*, 32 CFR § 296.4.

You asked me to comment on the fact that Congress in enacting the Office of Federal Procurement Policy Act, P.L. 93–400, rejected the idea of subjecting agency procurement regulations to the notice-and-comment procedures of section 553 and provided instead that the Administrator for Federal Procurement Policy should establish "criteria and procedures for an effective and timely method of soliciting the viewpoints of interested parties in the development of procurement policies, regulations, procedures and forms," § 6(d)(2). Naturally, the Conference was disappointed that Congress, in enacting the Office of Federal Procurement Policy Act, did not take the opportunity to make procurement regulations subject to notice-and-comment rulemaking procedures. Congress acted in accordance with, the Report of the Commission on Government Procurement, which expressed a fear of "unduly burdening the procurement process with APA-type rulemaking procedures."

In our view the notice-and-comment procedure required by section 553 is simple, flexible, and efficient and should not impose an undue burden on rulemaking in any agency. In fact it is no more than the Office of Federal Procurement Policy is currently proposing to require, 41 F.R. 779, 780. The objections of the Commission on Government Procurement seem to have been based not so much on the notice-and-comment procedures themselves as on the difficulties in determining to what sorts of agency actions such procedures should apply. We believe that our proposed amendment to section 553(b)(B) would meet these difficulties by enabling the procurement agencies and the Office of Federal Procurement Policy to determine *by category* those procurement regulations as to which notice and public procedure are "impracticable, unnecessary, or contrary to the public interest". However, we recognize that the affected agencies may desire some assurance that such determinations will be upheld. While we think the Procurement Commission report exaggerates the perils of judicial second guessing of agency determinations to forego notice and public procedure, a possible compromise position might be to assign to the Office of Federal Procurement Policy the task of defining those procurement regulations which are exempt from section 553. We would be glad to explore this possibility with the OFPP and your Committee.

Sincerely yours,

RICHARD K. BERG, *Executive Secretary.*

Mr. FLOWERS. Mr. Coffey?

Mr. COFFEY. I should direct this to Mr. Berg, but I would be happy to hear the comments of the witnesses. The third section of H.R. 10194 proposed some additional language to be added to the so-called good cause exception. I'm not so concerned with that language as I am with the good cause exception itself. I wonder if Mr. Berg or the other witnesses would like to comment about whether or not the subcommittee ought to consider additional language to define good cause. Perhaps, we should further spell out what is impracticable, unnecessary, or contrary to the public interest.

Mr. BERG. We have never done a study. We have contemplated a study but haven't found anyone to undertake it, as to exactly how and to what extent this has been utilized since its enactment. There is a passage in the Manual on the APA and in this passage, as I recall, the Attorney General Manual states that "impracticable" is the situation where time does not permit the notice and comment process because the agency must get its rules out; "unnecessary" is a fairly vague kind of situation in which the agency, for one reason or another, concludes that there is no useful purpose that could be served—perhaps the information is peculiarly within the agency's knowledge for example, and it may cover a situation in which the individual rules are so numerous that to go through notice and comment on each one just would obscure the forest for the trees so to speak—and, finally, contrary to public interest it is envisioned as a sort of situation similar to "impracticable"; it covers the situation in which the agency can't afford to tip its hand in advance because people will then adjust themselves accordingly and defeat the purpose of the rule. That is how the Attorney General Manual envisages the three circumstances.

I am inclined to think that the agency, when it decides it has good reason for not going through notice and comment, probably cites all three to be on the safe side.

Mr. COFFEY. But you don't feel that we need to be more specific in the statute?

Mr. BERG. Let me put it this way. I think it would be very difficult to be more specific. I don't know that it can't be done. I think it would be nice if we had this study of what the agencies have done; but we don't.

Mr. GREGORY. Might I comment on that?

Mr. COFFEY. Yes.

Mr. GREGORY. Thank you. I am commenting only because I had experience recently with an attempted definition through litigation of the word "relevant" as it exists in another Federal statute. I don't believe a word like "relevant" or a phrase like "contrary to the public interest" nor "impracticable" can be defined by legislation. However, the subcommittee, if it has a point of view as to when an agency ought to be allowed to resort to using this kind of exception, ought to spell out some parameters in the legislative history in the report accompanying the bill. You could use the phrase "impracticable, unnecessary, contrary to the public interest" in 20 pieces of legislation and have 20 different circumstances of legislative intent that caused the insertion of the phrase in the bill. I don't believe you can define it any better in the bill, but you can certainly state in the report the

committee's attitude as to the circumstances and frequency when such a phrase or word should be utilized as an exception.

Mr. COFFEY. Thank you, Mr. Chairman.

Mr. FLOWERS. Thank you. I think we probably have reached a stopping place already because the two bells indicate the first vote on the tax bill. My understanding is that we have only ten minutes of debate between separate votes, and I think it would be fruitless for us to try to proceed on that basis. I apologize to all of you gentlemen for this inconvenience. I hope that you will be available for us as we will continue this hearing probably some day next week. I know all of you are from the Washington area, and we just ask your indulgence. This is the way things happen around here at times.

Thank you, gentlemen. We will adjourn for the day.

[Whereupon, at 11 a.m. the subcommittee adjourned subject to call of the Chair:]

[Subsequent to the hearing the following correspondence was received for the record.]

DEPARTMENT OF STATE,
Washington, D.C., March 2, 1976.

Hon. PETER RODINO,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Your letter of January 22, 1976, requested a report on H.R. 10194, a bill "To amend chapter 5, subchapter II, of title 5, United States Code, to provide for improved administrative procedures." The Department has a special interest in section 2 of the bill which would amend section 553 of title 5, United States Code, which relates to rulemaking. H.R. 10194 would delete the present complete exemption from the public notice and comment requirements of this section for foreign affairs functions of the United States and substitute an exemption for only those foreign affairs functions which are required under Executive order criteria to be kept secret.

In our view, section 553 procedures are applicable to rules which are themselves to be published in the *Federal Register*. That is, if an agency statement "of general or particular applicability and future effect designed to implement . . . policy" is not itself required to be published in the *Federal Register* under 5 U.S.C. 552(a)(1) or other law, and is not so published, we believe the agency is not obliged to follow section 553 procedures before adopting that statement. Quite apart from the foreign affairs function exemption, we do not believe the Administrative Procedure Act contemplated, for example, that the Acting Legal Adviser's letter of May 19, 1952 to the Acting Attorney General, the so-called "Tate Letter" (XXVI *Bulletin*, Department of State, p. 984, June 23, 1952), should have been published in the *Federal Register* in draft for public comment before being dispatched to its addressee. That letter states in pertinent part "(I)t will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity."

We believe the foregoing interpretation of the scope of section 553 is borne out by consistent agency practice. We are unaware of any instance in which an agency has published as a proposed rule under section 553 a statement of policy that was not intended, as finally adopted, to be a public rule of the agency. In this context the national defense and foreign policy exception in H.R. 10194 would have practical significance in only a very narrow range of circumstances. It would have application only where an executive order precluded advance public notice of a rule which itself would be made public.

Accordingly, paragraph (1) of section 2 of H.R. 10194 really amounts to a repeal of the foreign affairs exemption. Rulemaking involving foreign affairs functions might in some instances be so permeated with foreign policy considerations that public participation would not be in the public interest. During consideration of this question by the Administrative Conference it was suggested that in such cases the Department could publish regulations in the *Federal Register*

without prior public notice by relying upon the existing exemptions contained in 5 U.S.C. 553 (b)(B) and (d)(3). In our view, an expanded use of these exemptions would introduce an undesirable subjective element into decisions as to whether or not proposed rulemaking procedures should be utilized. Agency reliance upon such subjective standards as "impracticable, unnecessary, or contrary to the public interest" would seem less conducive to increased public participation in rulemaking relating to foreign affairs functions. A more detailed statement of the reason for finding that public participation would be contrary the the public interest might itself have to be kept secret in the interest of national defense or foreign policy.

Heretofore, it has not been necessary to consider whether the general language of section 553 (b)(B) and (d)(3) covered foreign affairs functions. Rulemaking relating to such functions is separately and explicitly exempted from the application of section 553. Unless a clear and unambiguous legislative history indicated otherwise, however, an inference might be drawn from the repeal of the present foreign affairs exemption that the remaining general exemptions could not be construed to embrace a specific ground for noncompliance with section 553 procedures which the Congress had eliminated from the statute. Whatever the legislative history, such an argument would almost surely be made by some litigant.

Paragraph (3) of section 2 of H.R. 10194 amends clause (B) of the third sentence of 5 U.S.C. 553(b) to state that "contrary to the public interest" includes "the interest of national defense or foreign policy in a matter pertaining to a military or foreign affairs function." This change appears to be intended to overcome the concerns we have raised in the foregoing discussion.

In 1973, the Department voluntarily undertook to invite public participation in rulemaking, and since then there have been no occasions when the foreign affairs exemption has been invoked by this Department. We do not wish to speak for other agencies on the foreign affairs exemption; nor do we believe a sufficient basis has been established for a public interest in statutorily repealing or modifying the military exemption.

The Office of Management and Budget advises that from the standpoint of the Administration's program there is no objection to the submission of this report.

Sincerely,

ROBERT J. MCCLOSKEY,
Assistant Secretary for Congressional Relations.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
Washington, D.C., February 17, 1976.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary, House of Representatives,
Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Defense on H.R. 10194, 94th Congress. This bill contains several proposals to amend the Administrative Procedure Act. Those parts of the bill dealing with the definition of "rule" and the definition of "ratemaking and cognate proceedings," as well as accommodating modifications of 5 U.S.C. 556(d) and 5 U.S.C. 557(b), do not affect the day to day operation of this department. We, therefore, defer to the views of the Department of Justice on those aspects of the bill.

In our view the revision of section 553 of title 5, as set forth in section 2 of the bill, is premature insofar as it repeals the "military or foreign affairs" rulemaking exemption. Following many years of practice under that exemption, this department recently adopted procedures for public participation in rulemaking having direct and substantial public impact. 32 CFR Part 296; 40 F.R. 4911 (February 3, 1975). Because the regulations are only a few months old, we believe it desirable to gain the benefit of some practice under these new procedures. Their impact can then be realistically assessed in the light of actual experience. Accordingly, we submit that legislative changes in this area should await a period of experimentation under 32 CFR Part 296 so as to determine what, if any, practical problems would be posed for this department by repeal of the exemption.

H.R. 10194 would replace the "military or foreign affairs" rulemaking exemption, with an exemption for matters which are "in fact properly classified" in the interest of national defense or foreign policy. This language, apparently drawn

from the 1974 Amendments to the Freedom of Information Act, poses obvious problems. It is one thing to employ that standard in the context of a request for pre-existing documents; it is quite another matter to introduce that concept into ongoing policy-making. Moreover, the bill fails to explain who determines what "matter" is or is not "properly classified." Nor does the bill explain whether this issue is to be decided on review or de novo. In any event, we believe that a collateral dispute over the propriety of a classification could well delay the promulgation or effectiveness of important rules—with concomitant prejudice to the public interest.

The Commission on Government Procurement (created by Public Law 91-129) in an exhaustive 2½ year study of the entire Federal procurement process found that the varied practices among agencies in soliciting coments on proposed procurement regulations do not meet minimum standards for promoting fair dealing and equitable relationships among the parties in Government contracting. The Commission also found, however, that making procurement regulations subject to APA provisions, together with interpretative problems of applying APA definitions or terms such as "impracticable, unnecessary, or contrary to the public interest," among others, would significantly burden the procurement process. The Commission concluded that the formal requirements of APA will not significantly benefit the Government, the contractors, or other interested parties. In lieu of inflicting the uncertainties of the APA on the procurement process and the agencies, the Commission favored a requirement that an Office of Federal Procurement Policy establish criterial for participation in the development of procurement regulations.

This recommendation of the Commission on Government Procurement was incorporated into the statute (P.L. 93-400) which was enacted only last year and which set up the Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget (OMB). The OFPP only became fully staffed and operational within the past few months, and, we understand, has recently published in the *Federal Register* a draft regulation which will be the initial implementation of this statutory requirement.

In view of the responsibility and authority that has been placed in the OFPP on this matter of public participation in the procurement regulatory process, it is premature at best to suggest eliminating the exemptions currently contained in the Administrative Procedure Act. Therefore, the Department of Defense opposes this change.

Because the exact scope of the bill and its application are unclear, any estimate of the cost which its enactment would require would be purely speculative. However, there would undoubtedly be some additional costs.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the Committee.

Sincerely,

RICHARD A. WILEY.

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